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In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 495

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, *et al.*,

Petitioners,

v.

CENTRAL AIRLINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

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The International Association of Machinists, AFL-CIO, Russell H. O'Hara, J. D. Dossey, Donald E. Reaves, William N. Pratt, Alton C. Gillespie, Travis Underwood, Charles Harris, Herbert P. Pratt, Wilburn C. Meriweather, G. A. Garland, P. L. Seaborn, Ralph V. Harriss, Donald L. Acridge, George E. Neal, Jr., R. B. Williams, Sidney L. Boyer, Charles Zink, Benjamin A. Bryan, Faye Anderson, George W. Smith, Jr., Andrew Raliegh, C. L. Steele, Johnnie L. Owen, Harry R. Bradley, Albert Brauer, James F. Judge, Horace L. Green, W. C. Woods, M. C. Russell, Clayton T.

Phillips, Louis K. Griffin, Brady O. White, Gerald F. Heffley, Robert W. Hartnitt, M. E. Favor, George W. Wilson, N. G. Trimmer, Elmer L. Miles, Paul M. Stevens, Elmer L. Shoaf, Donald H. Cecil, Fred W. Rhea, Clair A. Bearer, W. W. Bowles, J. D. Anderson, Tommie Mitchner, E. F. Allmond, Carlos E. Casas, Bobby G. Donley, Tommy A. Purnell, Henry E. Cleveland, Clay Williams, Jr., Robert Williams, Bill J. Guthrie, Jack L. Curtis, R. L. Allgood, Kenneth M. Fuqua, John A. Shaffer, Aldon M. Sellers, Charles Florin, and Frank G. Harvey, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, entered in the above case on February 23, 1962.

OPINIONS BELOW

The Opinion of the Court below, and the Concurring Opinion of Associate Justice Thomas J. Renfro, are printed in Appendix A hereto, *infra*, pp. 1a-18a. They are reported at *355 S. W. 2d 803, 49 LRRM 3007*, and *44 CCH LC ¶17,459*.

JURISDICTION

The decision of the Court of Civil Appeals of Texas was rendered on February 23, 1962. Motion for rehearing was denied by said Court on April 13, 1962. An application for writ of error was filed in said Court on May 14, 1962, and in the Supreme Court of Texas on May 17, 1962. Said application was refused without opinion on July 11, 1962. (Copy of order denying said application is printed in Appendix B hereto, p. 19a.)

The denial of writ of error by the Supreme Court of Texas on July 11, 1962, made effective the decision of the Court of Civil Appeals as a final judgment rendered by the highest court of the state of Texas in which a decision could be had.

The jurisdiction of this Court rests upon *28 U.S.C. § 1257*. The decision of the State Court below may be reviewed by writ of certiorari under *28 U.S.C. § 1257(3)*.

QUESTIONS PRESENTED

1. Whether, under the Railway Labor Act and the collective bargaining contract in effect, a strike protesting denial of union representation is a strike arising over a "minor dispute" and therefore illegal.

2. Whether an air carrier violates the Railway Labor Act by withdrawing its members from a System Board of Adjustment, thus temporarily disestablishing such board, and whether discharged employees and the certified union representative, because of consequent inability to exhaust System Board remedies, thereby waive right to obtain judicial redress for the carrier's violation of the collective bargaining agreement and the Railway Labor Act.

STATUTES INVOLVED

The pertinent provisions of the *Railway Labor Act (44 Stat. L. 577, as amended; 45 U.S.C. §§151-163, 181-188)*, the *Labor Management Relations Act of 1947, as amended (61 Stat. 136, 29 U.S.C. §141 et seq)*, and the *Norris-LaGuardia Act (47 Stat. 70, 29 U.S.C. §§101-115)* are set forth in Appendix C, *infra*, p. 21a.

STATEMENT

This is a companion case to *International Association of Machinists, et al. v. Central Airlines, Inc., October Term, 1962, No. 61*, now pending in this Court. The six employees involved in that pending case were discharged for failure to attend a disciplinary hearing while under suspension, at which time they were denied union representation. The instant case arose from a strike which was called to protest this failure to permit union representation. There is no factual issue as to the purpose of the strike (Pl. Ex. 4-C-U-5; S. F. 524, S. F. 553[1]). Respondent conceded in its First Amended Original Answer (Tr. pp. 30-31[2]) that the stated reason for the strike "was the alleged refusal of the defendant, Central Airlines. to permit Union representation at the inquiry or investigation * * *." And the trial court acknowledged that the purpose was to obtain "a hearing and representation" (Tr. p. 151). The Court of Appeals agreed that such was the purpose (Appendix A, pp. 4a, 6a, *infra*), adding its legal conclusion that the six employees "were entitled to refuse any interviews without benefit of the presence of an advisor if they so chose." (Appendix A, p. 3a, *infra.*)

When the strike began, respondent promptly made a determination that all of the strikers were terminated as of the time they went out on strike (S. F. 346, 354), and during the course of the strike replacements were hired.

[1]S. F. refers to "Statement of Facts," the stenographic record of the trial.

[2]Tr. refers to the "Transcript," the compilation of pleadings and orders in the trial court.

During the strike, "neither the company nor the union sought any relief through the machinery of the courts, or through any grievance procedure of the contract or under the provisions of the Railway Labor Act" (Appendix A, p. 5a, *infra*). However, after the strike had been in progress for several days, the company granted the six employees a hearing on grievances which had been filed protesting their suspensions. The Opinion below summarized the termination of the strike as follows:

> "The strike lasted ten days. During that period the company representatives met with the union representatives, and at the meetings the union took the position that since the six suspended employees had been granted a hearing[3] and representation as provided by Section 22 of the contract, the purpose of the strike had been accomplished. The Union caused a notice to be delivered to the company which stated in part as follows: 'Due to the fact that the suspended employees were granted Union representation, the denial of which precipitated the above mentioned work stoppage, I have ordered all the employees to report to work at 8:00 A.M., Thursday, April 17, 1958.'
>
> "There was no written agreement in settlement of the strike, and there were no oral commitments by the company regarding the restoration to duty of all or any of them. The company merely stated that it would take each individual as he appeared and process his case. The union chose not to continue the strike until such time as any terms might be agreed upon, but ordered the men to report to the company, which they did. As the men appeared, the company processed them as applicants for employment in the same or near-identical

[3]The hearing referred to was the first step of a series of hearings that culminated in the award of Francis J. Robertson. (Pl. Ex. 1.) This award is also reproduced at pp. 10-36 of the Transcript of Record on file in the pending *Central* case. (No. 61.)

manner as it ordinarily processed an applicant for employment who had not theretofore been in an employer-employee relation with the company. The company adopted the position, which it was careful at all times to maintain, that when the strikers left and set up the picket line they had 'quit' their respective employments, and had themselves severed the employer-employee relationship existent immediately prior to the time they had gone on strike.

"The company restored some of the strikers to the same jobs at the same pay, some of them to jobs of a lower classification at reduced pay, but fifty-three were not re-employed at all. None of the strikers were ever served with notice of 'discharge' either orally or in writing. It is to be remembered that section 22 of the union contract provides that any 'discharge' from the employer-employee relationship must be by way of a service of notification in writing, and that subject thereto the individual dismissed has the right to apply for and receive an investigation and hearing." (Opinion, Appendix A, pp. 6a-7a.)

The Court of Appeals' Opinion holds the strike unlawful because it arose from a "minor dispute," and that in striking the union "elected to abandon recourse to the machinery afforded by the Act * * *" (p. 12a, *infra*). However, the Court did not retreat from, nor did it explain, its prior conclusion relating to the cause of the strike that

"* * * we are convinced that in view of the fact that the individuals were under discipline imposed by the company in view of their suspensions, they were entitled to refuse any interviews without benefit of the presence of an advisor if they so chose." (Appendix, p. 3a, *infra.*)

Nor did the Court comment directly on the result this denial of union representation would have had on the availability of

effective grievance machinery. Nor did the Court attach any significance to its prior finding that the company likewise did not seek relief "through any grievance procedure of the contract or under the provisions of the Railway Labor Act" (Appendix A, p. 5a, *infra*).

But the Court below did find, contrary to the contention of the respondent, that the fifty-three employees who were held out of service did not terminate their employment by the act of striking. It found that the congressional intent in the Railway Labor Act was

> "* * * that although an individual employee engages in collective action, as in a strike, his status continues to be that of an employee, even though the collective strike activity in which he has engaged may be illegal within the purport of the Act * * *
>
> "* * * each individual striking member of the union must be considered to have thereafter continued in his status as an employee. * * *"

The Court of Appeals, however, denied the union and the terminated employees the fruits of this conclusion, for two reasons.

It *first* found, contrary to the view of the trial court, that the union and the employees had abandoned available steps in the grievance procedure and thus were "without standing in the courts and the relief prayed for is foreclosed" (Appendix A, pp. 12a-13a, *infra*). In treating the System Board as an "available" step, the Court of Appeals simply assumed the existence of a firmly established system board of adjustment. We hasten to add, however, that this does not raise any issue of fact. The trial court, for example, acknowledged that "the

company refused to recognize the Board's authority in the matter" (Tr. 55). And the evidence is entirely undisputed that the carrier did refuse to recognize the Board's authority, in fact, it withdrew its two members from the Board and prevented the Board from functioning.

The undisputed evidence was that on July 2, 1958, the union submitted the cases to the Central-IAM System Board of Adjustment, which was composed of two company representatives and two union representatives. The cases remained pending, without the company members ever conceding a deadlock, until hearing before the four man Board was resumed on June 29, 1959, at which time the company board members made the following statement and withdrew from the proceedings:

> "Let the record reflect that in so far as the company members of the Board are concerned that if the Chairman persists in attempting to go forward with cases number 36 through 96, the company members of the Board have no alternative but to withdraw and have no participation therein." (S. F. 412-413, Pl. Ex. 4, pp. 24-25.)[4]

Thus, respondent, as to all grievances involved herein, either failed to establish, or disestablished, the System Board of Adjustment, and there was no such Board available to adjust and decide the dispute. What the Court of Appeals referred to as an abandonment of further *available* steps in the grievance procedure was in fact merely a recognition by the union that the carrier had refused to make the System Board available; hence, after two years of efforts to process

[4] A summary of the undisputed evidence relating to the union's efforts to obtain system board determination of these cases is contained in Appendix D hereto, p. 29a, *infra*.

the cases under the contract,[5] the union had no place to go except to the courts.

The *second* reason by which the Court of Appeals nullified the effect of its holding that the strikers' employment had not been terminated by the act of striking, was its conclusion, based on the finding that the strike was illegal,

> "* * * that as applied to the strikers, whose jobs were filled during the time they were voluntarily holding themselves out of service, their rights under the union contract should be considered to have been abrogated, at least to the extent of any seniority right to jobs filled by the new employees, when they resorted to a strike rather than to the grievance procedure of the contract." (Appendix A, pp. 13a-14a, *infra.*)

In addition to the foregoing, this case also involves the contracting out of bargaining unit work to maintenance contractors, a practice which was begun during the strike. The material facts are not in dispute (S. F. 275-283). The contract (Pl. Ex. 4-A) provided that the work was within "the scope of this Agreement." [Section 9(b) of contract]. For purposes of this petition, this issue is essentially the same as the issue involved in the withheld from service cases, for the Court of Appeals found

> "* * * this was a subject of grievance which was filed along with those relating to the fifty-three strikers and which was abandoned after once begun and carried through the majority of the 'steps' in grievance procedure prior to the filing of the suit. What we have already said relative to the binding effect of the election by the union and employees to proceed under grievance procedure would apply to this matter as well." (Appendix A, p. 16a, *infra.*)

[5]The Court of Appeals found that "the company delayed proceedings in every way and at every opportunity * * *." (Appendix A, p. 8a, *infra.*) pending *Central* case. (No. 61.)

This follows, because this grievance never reached deadlock either, for it was within the group of system board cases as to which respondent withdrew its board members (See Appendix D hereto, p. 29a).

The present action was brought in the state district court of Tarrant County on February 29, 1960.

Petitioner raised the federal question in the instant case initially in the trial court (Tr. pp. 2-17, S. F. 553). Respondent's defense set up the illegality of the strike under the Railway Labor Act (Tr. pp. 26-35, S. F. 11). The appeal to the Court of Appeals below, the motion for rehearing and the application for writ of error, all raised the federal question herein (Brief to Court of Appeals, Points 2, 3, 4, 5, 6, 7, and 12 in particular; Motion for Rehearing, points 8, 10, 11, 12, 18, 19, 20, 21, 22, 23, and 28 in particular; Application for Writ of Error, points 2, 3, 4, and 5 in particular). The Court of Appeals was mindful that it was construing a federal statute, for it noted that

> "The law of the case is provided in the Railway Labor Act—Carriers by Air, U.S.C.A. Title 45 'Railroads,' Ch. 8, Secs. 151-188." (Appendix A, p. 9a, *infra.*)

REASONS FOR GRANTING THE WRIT

1. The doctrine of the *unfair labor practice strike* is firmly established and recognized under the National Labor Relations Act, and this Court in *Mastro Plastics Corp. v. N.L.R.B., 350 U. S. 270, 100 L. Ed. 309, 76 S. Ct. 349,* addressed itself to the related question:

> "Does the collective bargaining contract waive the employees' right to strike against the unfair labor practices committed by their employers?"

The Court responded that there was nothing in the contract in issue, notwithstanding the existence of a no-strike clause,[6] which waived the employees' right to strike solely against the unfair labor practices of their employers. *350 U. S. 270, 284.* See also *N.L.R.B. v. Wagner Iron Works, 220 F. 2d 126.*

The instant case poses essentially the same question under the Railway Labor Act. Borrowing Taft-Hartley phraseology, the strike involved in this case was an unfair labor practice strike—for its purpose, as found by the courts below, was to obtain union representation at a disciplinary hearing for six employees whom the company had suspended. The strike protested the employer's refusal to recognize and treat with the certified representative of its employees, in violation of Section 2, First, Second, Third, Fourth, and the general purpose clause of Section 2 of the Railway Labor Act.

The courts and the National Labor Relations Board have generally maintained a parallel interpretation as to the duty to bargain under both the Railway Labor Act and the Labor Management Relations Act of 1947, as amended. *Elgin, Joliet and Eastern Railway v. Burley, 325 U. S. 711, 89 L. Ed. 1886, 65 S. Ct. 1282; Railroad Telegraphers v. Chicago & N.W.R. Co., 362 U. S. 330, 4 L. Ed. 2d 774, 80 S. Ct. 761; Bethlehem Steel Co., 89 N.L.R.B. 341, 25 LRRM 1564; Town & Country Mfg. Co., Inc., 136 N.L.R.B. No. 111, 49 LRRM 1918; Railway Clerks v. Atlantic Coast Line R. Co.,*

[6]The Central-IAM contract did not contain a no-strike clause, to which fact petitioner attaches no special significance except in so far as it indicates the intent of the parties to limit their grievance procedure to contractual disputes. The instant dispute which precipitated the strike, however, was over the carrier's refusal to follow the grievance procedure, and that specific dispute was never the subject of a formal grievance by either the union or the carrier.

201 F. 2d 36, Cert. den. 355 U. S. 992, 73 S. Ct. 1131. In *Steele v. Louisville & N.R. Co., 323 U. S. 192, 200, 89 L. Ed. 173, 65 S. Ct. 226,* this Court referred to the duty to bargain under the two statutes as "like provisions."

It has long been recognized that bargaining under both statutes means more than merely periodically negotiating collective bargaining contracts. It also means treating exclusively with the union representative as to bargainable matters and not dealing individually or settling grievances directly with employees except in the limited manner provided by express statutory provision. Respondent's refusal to permit union representation herein would patently have been a violation of Sections 8(a)(1) and 8(a)(5) of the Labor Management Relations Act, had that statute been applicable, and in fact it was a violation of the comparable provisions, *supra*, of the Railway Labor Act. *Bethlehem Steel Co., supra; Gagnon Plating and Mfg. Co., 103 NLRB 263, 269; E. I. Dupont De Nemours & Co., 115 NLRB 84, 96.* Cf. footnote 35 in *Elgin, Joliet and Eastern Ry. v. Burley, supra, 325 U. S. 711, 737.*

By granting certiorari herein, the Court will have an opportunity to determine whether the parallel duties under the two statutes require parallel treatment of the right to strike against an employer's violation of its statutory duty to bargain and deal with the representative of its employees.

The traditional concept of "major" and "minor" disputes has adequately served to describe most Railway Labor Act disputes and strikes spawned by such disputes;[7] however,

[7] *Elgin, Joliet and Eastern Ry. v. Burley, supra; Brotherhood of R. R. T. v. Chicago River & I. R. Co., 353 U. S. 30, 1 L. Ed. 2d 622, 77 S. Ct. 635.*

that concept has not been sufficiently flexible to encompass all types of disputes and strikes which have occurred under the Act. For example, the concept pre-supposes the existence of a grievance procedure available to either party and capable of making a final and binding determination as to the construction, interpretation, and application of existing contracts. But the instant case illustrates that in the airline industry, where there is no National Board of Adjustment, recourse must generally be had to separate system boards of adjustment, which may or may not be available, depending on the cooperation of both parties. Furthermore, the strike in the instant case was actually caused by the employer's refusal to comply with the contractual grievance procedure. Ultimately the employer refused to join with the union to compose a system board which could have settled the case now before this court, and this employer also refused to comply with the same System Board Award to which it has pointed as proof that system board relief was available if the employees were aggrieved by the denial of union representation.[8]

Although the precise question posed herein is one of first impression in this Court, several United States Courts of Appeals and this Court have passed on questions related in principle, but the Opinion of the Court below runs counter to the principle underlying such cases. The Courts have refused to permit injunctions, under the mandate of the Norris-LaGuardia Act, as to certain strikes where the causal dispute either could not be classified simply as "major" or

[8]The Robertson award involved in the pending *Central* case No. 61.

"minor", or where the classification of "minor dispute" did not, *ipso facto*, provide legal basis for declaring the strike enjoinable or unlawful.

Manion v. Kansas City Terminal Railway, 353 U. S. 927, 1 L. Ed. 2d 722, 77 S. Ct. 706, indicated that a carrier would not be entitled to an injunction against a strike during the term of a contract unless the subject matter of what would otherwise be a minor dispute is pending before the appropriate Board of Adjustment, or at least, efforts have been made to bring such dispute before such Board. In remanding *Manion* "without prejudice to the power of the Court of Appeals to reinstate its judgment if the dispute is submitted to the Adjustment Board by *either* party within a reasonable time,"[9] was the Court not placing a significant caveat on the *Chicago River* (*supra*, footnote 7) doctrine? It would appear that if the complaining party has ignored the adjustment board machinery *Chicago River* does not apply and the proscription of Norris-LaGuardia remains effective, which was the interpretation which the Seventh Circuit gave the *Manion* case,

> "* * * that a court should not permit the use of its injunctive powers in cases involving minor disputes where such disputes could have been submitted to the Adjustment Board." *Hilbert v. Penn. R.R. Co., 290 F. 2d 811, 885-886.*

Confusion in terms is perhaps inevitable in certain cases where attempt has been made to squeeze the dispute into either a "major" or "minor" slot. Illustrative are two significant decisions of the Ninth and Second Circuits, where

[9]Emphasis added.

the courts in essence recognized that a strike under the Railway Labor Act may be protected in the same manner as under the Taft-Hartley Act. Of course, the phrase "unfair labor practice strike" has not been used, but the judicial result appears to be the same.

The Ninth Circuit, in *Butte, Anaconda & P. Ry. Co. v. Locomotive Firemen, 268 F. 2d 54*, denied use of an injunction against a strike where it found that the carrier

> "* * * does not seek an injunction to compel utilization of Railway Labor Act procedures. Rather it wants to enjoin employees from resorting to selfhelp after appellant itself (through Anaconda) abandoned those procedures."

This case is an example of the privileged use of a strike, provoked by a carrier, even when other avenues of relief might have been open to the union.[10]

And more recently, a Second Circuit majority held in *Rutland Railway v. Locomotive Engineers, F. 2d , 50 LRRM 2535 (Petition for Certiorari filed Aug. 28, 1962, No. 380, Oct. 1962 Term)*, after characterizing the dispute as "minor" that if in fact the carrier "has failed to take the steps required of it by the Railway Labor Act, it is not entitled to injunctive relief against the strike of its employees."

And in *Northwest Airlines v. Transport Workers, 190 F. Supp. 495 (42 CCH Lab. Cases ¶16,764)*, a District Court came close to using Taft-Hartley concepts when it refused an injunction where an airline's navigators were honoring the

[10]The Court also stated, citing the *Manion* case, that because of employer's failure to submit the dispute to the Adjustment Board, even if the dispute had been "minor," Section 8 of Norris-LaGuardia Act would have barred an injunction.

picket line of another union. The Court found this to be "a concerted refusal to work, actively encouraged and directed by the officers of the local union and the international," but not a "minor" labor dispute. Cf. *Boeing Airplane Co. v. Machinists, 188 F. 2d 356, cert. den. 342 U. S. 821.*

The policy expressed in the foregoing cases follows the direction laid down by this Court in *Brotherhood of R.R. Trainmen v. Toledo P. & W. R.R., 321 U. S. 50, 88 L. Ed. 534, 64 S. Ct. 413,* in which Section 8 of the Norris-La Guardia Act was held to deny injunctive relief against a strike where a carrier had omitted the step of arbitration and thus failed to make "every reasonable effort" to settle the dispute. Otherwise, injunction would have been available. The Court there announced that

> "The policy of the Railway Labor Act was to encourage use of the non-judicial process of negotiation, mediation and arbitration for the adjustment of labor disputes." *321 U. S. 50, 63.*

The same policy, applied to the instant case, would require reversal of the Court below, on grounds that by denying union representation at the grievance hearing, the carrier violated the statute. The carrier's hands were not clean. A strike to enforce the statutory duty should not have been classified as a "minor dispute" or if so classified, the carrier's failure to use grievance procedures and to make such procedures available to the union ought to have prevented a finding that the strike was illegal. And if the strike was not illegal, the employer's constructive discharge of the strikers, which occurred at the beginning of the strike and before

replacements were hired, should have been found unlawful and in violation of the contract and the Act.

The Court below erred in holding that the employees, by their act of striking, lost their rights under the union contract "at least to the extent of any seniority right to jobs filled by the new employees * * *." Query, if the contract remains in effect, as it did here, may the employer ignore the contractual procedures for terminating seniority for "just cause" only? This question affects not only employees under the Railway Labor Act, but substantially all employees under collective bargaining. The decision below runs counter to established contract law, that where a party fails to rescind a contract in response to a material breach—such as a strike in violation of the contract—he is bound to follow the contract as to his remedies. This principle has been applied under the Railway Labor Act, though of necessity generally by system boards of adjustment and Presidential Emergency Boards. *Boeing Airplane Co. v. Machinists, 188 F. 2d 356 affirming 91 F. Supp. 596, cert. den. 342 U. S. 821, 96 L. Ed. 629; Trans World Airlines, Inc., 24 LA 95; Presidential Emergency Board, No. 62.* Such cases indicate that even as to illegal strikes, the contractual procedure for discharge must be followed, otherwise the discharged strikers are entitled to reinstatement. Such a result is consistent with the procedural due process which a contractual grievance procedure attempts to achieve. In view of the strong public interest in labor disputes affecting transportation, especially those in the airline industry, this issue is a proper one for this Court.

This case raises the further question, should the withheld from service employees have been treated the same as unfair labor practice strikers and returned to their jobs notwithstanding that replacements had been hired? The rule is clear under the Taft-Hartley Act. *N.L.R.B. v. U. S. Cold Storage, 203 F. 2d 924; Modern Motors, Inc., 96 NLRB 964.* Petitioner contends the rule should be the same under the Railway Labor Act, and the strikers should have been reinstated and made whole as to their losses from the date the strike ended, at which time they had made an unconditional offer to return to work.

2. The second question raised by this petition is whether a carrier violates the Railway Labor Act when it withdraws its members from a system board of adjustment, thereby preventing a deadlock and the appointment of a neutral. In view of the similarity between system board hearings in the airline industry and arbitration proceedings generally, the principles enunciated in the *Steelworkers trilogy*[11] ought to be applicable. If not, judicial elucidation as to the differences will be of immeasurable benefit to the parties who must deal with the arbitrable process in the airline industry through system boards. The *Chicago River* case, *supra*, breathed life into and gave definition to the grievance settlement process under the Railway Labor Act, but the subject there defined was the statutory National Railway Adjustment Board, over which a single party had no control. There is now need for similar attention to the system board process

[11] *United Steelworkers v. American Mfg. Co., 363 U. S. 564, 4 L. Ed. 2d 1403, 80 S. Ct. 1343; United Steelworkers v. Warrior & G. Nav. Co., 363 U. S. 574, 4 L. Ed. 1409, 80 S. Ct. 1347; United Steelworkers v. Enterprise Corp., 363 U. S. 593, 4 L. Ed. 2d 1424, 80 S. Ct. 1358.*

as it affects the airline industry, for if a carrier can frustrate system board determination by withdrawing from the board, then certainly the *Chicago River* doctrine, which allows injunction against minor dispute strikes because of availability of meaningful adjustment board remedies, will have been placed in jeopardy. No citation of authority is required to demonstrate the frequency with which United States District Courts have issued injunctions against airline strikes in recent years, which injunctions have been based on the *Chicago River* doctrine. Certainly it is reasonable to expect that the system board remedy be both available and effective if unions are to be required to give up their right to strike, for the language of the Railway Labor Act itself exacts no such drastic penalty directly. If the decision below is not reviewed and set aside, it will stand as an open invitation to any airline employer desiring to sidestep the employees' representative and make a mockery of the system board procedures. Such a result can only destroy the basic scheme of the Railway Labor Act insofar as it affects the airline industry.

Section 204 of the Act makes it the duty of the carrier and the representative *to establish* the board of adjustment. It seems basic, therefore, that when the company members walked out of the hearing room on June 29, 1959, and announced their withdrawal from all further participation and thereby prevented a deadlock and appointment of a neutral, respondent was *disestablishing* the Board for purposes of the instant grievances.

3. The final reason for granting the writ is perhaps already implicit in what has previously been stated. Fifty-three employees have been denied their jobs and others have suffered economic hardship. The union's collective bargaining position has been obviously impaired. The relief which this Court has power to grant in the companion *Central* case, now pending, cannot be complete as to the basic dispute unless this case is also reviewed. Both cases arise from common events and if meaningful judicial review is to be achieved, both should be passed on by this Court.

CONCLUSION

Based on the foregoing reasons, writ of certiorari should be granted, for the State Court has erred substantially in the interpretation of a federal statute. Upon review, the decision of the Court below should be reversed and remanded for ascertainment of damages by the trial court.[12]

Respectfully submitted,

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October 6, 1962

[12] Pursuant to stipulation of the parties (Tr. 42).

APPENDIX A

Opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas

No. 16297

From the District Court of Tarrant County

Plaintiff union and numerous individuals brought suit against the defendant airline company for damages accrued as the result of their wrongful discharge from an employer-employee relationship, formerly existent between the individuals and the company, in breach of union contract existing at the date of discharge, for a writ of injunction which would restore the individuals to their former jobs and for general relief. Additional complaint, by the union in behalf of all employees of the company represented by it, was because of the company's practice, begun on and after the date claimed as that of the individuals' wrongful discharge, of contracting out maintenance work on its aircraft. Such work had formerly been performed by the company on its own premises by its own employees.

Trial was before the court without intervention of a jury, and judgment was rendered against the individuals and the union and in behalf of the company. No findings of fact or conclusions of law were requested or filed. An appeal was taken to this court.

Judgment affirmed.

The individuals bringing the suit had been among that category of employees of the company represented by the union under a contract in effect between the union and the company on date of April 7, 1958. On said date the union called a strike, in which all of said individuals participated, because of certain mistreatment the union believed the company had afforded six of its employees (not the individuals considered in this suit) growing out of said employees' refusal to work overtime on one of its aircraft.

It would be well to understand the affair of the six employees in question, so we will attempt to briefly state it.

On April 4 and 5, 1958, the six employees were served by the company with written notice that they were each "suspended from service" and instructed to present themselves at 8:00 o'clock on the morning of April 7, 1958, at the office of the company's director of maintenance. The company, through its said director, intended to question the employees concerning their reasons for refusing to work overtime on the aircraft. The employees appeared on the company premises as requested, though they were not on the payroll of the company in view of their "suspensions". Union representatives, one a co-employee of the men appearing and one not an employee, presented themselves along with those the company had directed to appear. The company insisted that it was entitled to talk to the men individually and privately. The men and the union representatives insisted that the company did not have the right to do so. There was a refusal on their part that any such interview be held. While it was not de-

fined as such, we believe that the union was contending that what the company desired amounted to a "step" in the grievance procedure of the contract between the company and the union, while the company was contending that it did not amount to such a "step". Be that as it may, we are convinced that in view of the fact that the individuals were under discipline imposed by the company in view of their suspensions, they were entitled to refuse any interviews without benefit of the presence of an advisor if they so chose. They did so choose, and the company would not accede, whereupon they left the premises.

Section 22, entitled "Investigation and Discipline", is the part of the contract which was in effect between the company and the union which the union believed to have been invoked by the company, and which the company did not consider to have application. Material portions thereof read as follows: "(a) Hearing. 1. An employee shall not be disciplined or dismissed from the service of the Company without notification in writing of such action. An employee who is disciplined or dismissed shall be entitled to an investigation and hearing thereon, provided that such employee makes written request for such investigation and hearing within seven (7) days after receiving such notification. 2. An employee may be held out of service by the Company pending such investigation and hearing and appeals therefrom * * *. 4. Prio. to such investigation and hearing, such employee shall be notified in writing by the Company of the precise charge or charges against him. He shall be given the necessary time, not exceeding seven (7) days, in which to secure the presence

of witnesses and shall have the right to be represented by the employee of the Company of his choice or by his duly accredited representative or representatives. 5. Such investigation and hearing shall be held by a maintenance supervisor of the Company, designated by the Company for that purpose, and shall be held within seven (7) days after the receipt of the employee's written request therefor." Further provisions prescribe time schedules within which decisions are to be rendered, and for appellate steps and decisions and forms thereof through the company and thence before the Central Airlines, Inc. Mechanics' System Board of Adjustment.

As a matter of information, it is to be noted that each of the six individual employees, after the events heretofore mentioned, filed their written request for an investigation and hearing under the provisions of Section 22 (a) 1 of the aforesaid contract. These were honored and processed by the company in accordance with the other provisions of said section.

The union and other employees of the company did not wait until the individual employees filed such written request for investigation and hearing. Obviously they were incensed at the attitude of the company and its representatives on the morning of April 7th. A union meeting was called for a time later in the day at which the majority present proceeded erroneously upon the supposition that the company had breached the provisions of the union contract by refusing to proceed with the interview it had requested of the suspended individuals in and with the presence of one or more representatives of the union. Although it should have been clear to anyone with the slightest legal training that the

company had not breached the contract, the union and its membership certainly in the best of faith, reached a conclusion to the contrary. By wire the following notice was prepared and served upon the company, "* * * your failure to comply with section 22 which calls for the presence of a union representative in a suspension hearing involving * * * (is) such a material breach of the agreement that we have no alternative but to exercise the rights reserved for us in engaging in concerted action to protest the agreements from such continuing violations the above mentioned employees as well as those engaging in concerted action are ready, willing and able to comply with section 7 of the agreement which does not call for forced overtime employment. Your attempt to impliedly write into the contract a forced overtime provision is in strict violation of section seven of the agreement."

A strike was called and the great majority of the union employees failed to present themselves for work on the following day, April 8, 1958. The union put out a picket line at the company's plant. It was not honored by the members of other unions. The company publicized the fact that it was taking applications to fill the strikers' jobs and began hiring new employees as permanent replacements. The company also negotiated contracts with private contractors for work to be done away from its premises.

Neither the company nor the union sought any relief through the machinery of the courts, or through any grievance procedure of the contract or under the provisions of the Railway Labor Act. As previously indicated, a request for

hearing was filed by or in behalf of the six suspended employees, and the company was careful to proceed thereupon in strict compliance with the provisions of the union contract. At all times the company treated the contract as one continuing in effect.

The strike lasted ten days. During that period the company representatives met with the union representatives, and at the meetings the union took the position that since the six suspended employees had been granted a hearing and representation as provided by Section 22 of the contract, the purpose of the strike had been accomplished. The union caused a notice to be delivered to the company which stated in part as follows: "Due to the fact that the suspended employees were granted Union representation, the denial of which precipitated the above mentioned work stoppage, I have ordered all the employees to report to work at 8:00 A.M., Thursday, April 17, 1958."

There was no written agreement in settlement of the strike, and there were no oral commitments by the company regarding the restoration to duty of all or any of them. The company merely stated that it would take each individual as he appeared and process his case. The union chose not to continue the strike until such time as any terms might be agreed upon, but ordered the men to report to the company, which they did. As the men appeared, the company processed them as applicants for employment in the same or near-identical manner as it ordinarily processed an applicant for employment who had not theretofore been in an employer-employee

relation with the company. The company adopted the position, which it was careful at all times to maintain, that when the strikers left and set up the picket line they had "quit" their respective employments, and had themselves severed the employer-employee relationship existent immediately prior to the time they had gone on strike.

The company restored some of the strikers to the same jobs at the same pay, some of them to jobs of a lower classification at reduced pay, but fifty-three were not re-employed at all. None of the strikers were ever served with notice of "discharge" either orally or in writing. It is to be remembered that section 22 of the union contract provides that any "discharge" from the employer-employee relationship must be by way of a service of notification in writing, and that subject thereto the individual dismissed has the right to apply for and receive an investigation and hearing.

Not being restored to service at any work whatever, the fifty-three aforementioned individuals did file, within seven (7) days, grievance forms in which substantially the following uniform statement was made: "I have been unjustly held out of service since I reported for it at 8 A.M. on Thursday, April 17, 1958. In accordance with Section 22 of the current I. A. of M.—Central Airlines, Inc. Agreement, I request that I be reinstated without loss of seniority rights and that I be paid for all loss of pay involved." Albeit contesting at every step the right of any of the fifty-three to be heard and considered as a person entitled to the procedure afforded by section 22 of the contract, the company honored the "steps" for grievance procedure set forth thereunder, in

so far as any "step" required action by anyone within the company's power to furnish or control. Admittedly the company delayed proceedings in every way and at every opportunity, being careful to barely "skate inside" the boundaries beyond which it would be safe for it to go without jeopardy to its avowed contentions.

Despite attendant delays the grievances were processed step-by-step up until they reached the point where the union (and the individuals) petitioned the National Mediation Board for a neutral referee to make a decision in the case. Such was a "step" in grievance procedure preliminary to any finality of decision under the provisions of the contract and the Railway Labor Act. At no point did the company so act or refuse to act as to block orderly processing of the cases, and indeed to do so would not be within its power, albeit, as already mentioned, it delayed matters when it could and it at all times contested the right of jurisdiction of those provided and/or required to make determinations—under the theory that the employer-employee relationship which had formerly existed between it and the strikers was voluntarily severed by the employees themselves as the result of their unilateral unlawful strike action. After having petitioned for a neutral referee the union (and the individuals) withdrew application therefor (and for further action under grievance procedure). The suit in district court was filed.

At all times prior to filing the suit the contention of the union and the individuals was that the employer-employee relationship between the company and the individuals per-

sisted up until the time any further grievance procedure was authorized and permissible as applied to the matter upon which grievance was filed, and that the individuals were merely "out of service", and wrongfully held in such state of suspension by the company. In filing the suit, on February 29, 1960, they apparently accepted the contention of the company that the employer-employee relationship was in fact severed, at least as of the date of April 17, 1958, when they appeared and presented themselves as available to perform the duties of their employment. Thus they attempted, by agreement to be implied, to yield in their first contentions upon being "held out of service" and to narrow the issue to a question of whether the severance of the employer-employee relationship was the fault of the company in that it wrongfully "discharged" them, or whether it was their own fault in that they "quit" their employment relation. We entertain considerable doubt, under the circumstances, of the propriety of either party's attempt to retroactively fix the men's status as one in which the employer-employee relationship did not exist.

Despite the fact that the union and the strikers ultimately offered to agree and concede that the employer-employee relationship was terminated in April of 1958, we believe it would be wise to examine the state of the law.

The law of the case is provided in the Railway Labor Act—Carriers by Air, U.S.C.A. Title 45 "Railroads", ch. 8, Secs. 151-188.

Under the Act it is provided in both section 152 and section 159 that nothing contained in the Act shall be construed to make the quitting of his labor or service by an individual employee an illegal act. To us the meaning of this encompasses the congressional intent that although an individual employee engages in collective action, as in a strike, his status continues to be that of an employee, even though the collective strike activity in which he has engaged may be illegal within the purport of the Act. Furthermore, it means that no such individual employee may be treated and considered as having quit his employment, or as having severed his relation to his employer as an employee, but conversely must be treated and considered as having ceased from his labor or having held himself "out of service" on a temporary basis. A like distinction was recognized by the Supreme Court of Texas in the case of International Union of Operating Engineers v. Cox, 1949, 148 Tex. 42, 219 S. W. 2d 787. In view thereof it would appear that it would only be in instances of discharge, acknowledged as such, that a period could be considered to have begun for which damages could be sought under the theory that the discharge was wrongful.

By striking it may be that an individual employee may abrogate certain of his rights under the contract to which he is privy as a member of a union which negotiated it, but, in view of the Act, his right to have his status as an employee would in every case persist and would not be totally altered solely on account of the fact that he had engaged in a strike, regardless of its legality or illegality. If he be discharged because he was or had been a striker he would be entitled to

elect as to whether he preferred to file a grievance subject to appeal to the ultimate appellate body constituted within the contemplation of the Railway Labor Act in seeking reinstatement, plus damages perhaps,—or preferred to honor and accept the discharge and sue for immediate relief in the form of damages.

Under the circumstances of this case we are of the opinion that because of the fact that the collective strike action was contrary to the intent and purpose of the Railway Labor Act, and therefore unlawful, yet, for purposes of the Act, each individual striking member of the union must be considered to have thereafter continued in his status as an employee, albeit one who has voluntarily held himself "out of service", for none of them quit or were discharged from the "employee" status.

Consideration may well be given to a determination of whether the case before us has grown out of a labor dispute properly characterized as a "minor dispute", enjoinable by the courts, or as a "major dispute", not subject to injunction. Referring to the case of Elgin, J. & E. R. Co. v. Burley, 1945, 325 U. S. 711, at page 723, 65 S. Ct. 1282, at page 1290, 89 L. Ed. 1886, and considering the nature of the dispute over which the union called the strike, it is readily determined that the strike arose over a "minor dispute", i. e., at most one in which the union and its membership contended for interpretation or enforcement of contractual rights previously agreed upon, rather than to create any new contractual right.

Under the present state of the law applicable to the transport industries a strike called over a "minor dispute" between management and labor may be enjoined to prevent a tie-up of transportation facilities. The primary purpose of the Railway Labor Act is to avoid interruption of commerce by providing for orderly, peaceful settlement of such disputes, which form of settlement is by the Act made the duty of both labor and management, in Sec. 152 and 184 under procedure prescribed and made enforceable under provisions of these sections and Secs. 153, 155 and 185.

It is obvious from the circumstances of this case that the union, in calling the strike, elected to abandon recourse to the machinery afforded by the Act and to penalize the company by economic coercion. The company elected to refrain from seeking to combat the union's strike activity through injunctive procedure, but instead sought to accommodate itself to the condition confronting it by allaying its problems in hiring new employees and contracting out certain of the work it had formerly handled.

Conceding arguendo, that the strikers who were not returned to work were and continued to be its employees, and that its relation to them was as employer to employee, regulated by the provisions of the union contract, the company asserts as binding upon them their presentation of their grievances through procedure afforded under the contract itself and under the Railway Labor Act. Ergo, says the company, since the last decision under the grievance procedure was against the contentions of the union and the strikers who were not returned to service, and since they abandoned

further available "steps" in the grievance procedure, such last decision had become final and they are without standing in the courts and the relief prayed for is foreclosed.

In connection with such contention of the company we are of the opinion that it is correct and should be sustained and that the cause of action of the union and the individuals might have been properly dismissed. Sarran v. Missouri Pacific Railroad Company, 1959 (Tex. Civ. App., San Antonio), 330 S. W. 2d 925, error refused; Union Pacific R. Co. v. Price, 1959, 360 U. S. 601, 79 S. Ct. 1351, 1355, 3 L. Ed. 2d 1460.

Except for the fact that we believe the proper order in the trial court might have been dismissal of the cause had the company moved for a dismissal, the judgment should be one affirming the denial of relief for the same reasons.

Assuming there would be no question of propriety for this court to consider that it possessed the right to act in all respects rather than merely upon the right to damages, it would seem that if we could, and were to sustain the union and the strikers who were not reinstated in service—would oust from their jobs those new employees who went to work for the company while the illegal strike was in progress. We believe that as applied to the strikers, whose jobs were filled during the time they were voluntarily holding themselves out of service, their rights under the union contract should be considered to have been abrogated, at least to the extent of any seniority right to jobs filled by the new employees, when they resorted to a strike rather than to the grievance proce-

dure of the contract. Indeed, it appears that the newly hired employees came under the jurisdiction of the union contract upon their employment by the company, or at least shortly thereafter, and their own rights would be those specified by the same contract. It is to be noticed that the company never at any time treated the contract as having been wholly abrogated, and even during the progress of the strike proceeded to honor its processes for the handling of the grievances of the six suspended employees as to whom the dispute arose culminating in the strike.

Since the Act requires the strikers to be individually considered, we may hypothesize the situation as follows: No. 1 employee refuses to perform the service for which he is employed by the company and holds himself "out of service" pending satisfaction demanded of the company. While the situation persists No. 2 applicant, presents himself for employment and certifies himself ready to perform the job in question, and the company enters into the employer-employee relationship with him and he begins to perform service on the job from which No. 1 absented himself. Should No. 1 present himself to the company and certify his readiness to resume the duties of his employment on such job, withdrawing his previous demands, is the company in duty bound to restore him to the job despite the fact that to do so would require it to hold No. 2 "out of service"?

We think not. If the company were so required, No. 1 would be afforded the opportunity to continue on the job until he was assured that the services of No. 2 were no longer available to the company, whereupon he could again hold him-

self absent as "out of service" until the company met the same demands, once withdrawn but now reasserted. By this means would be placed within the power of No. 1 all the weapons of economic coercion, while at the same time the company would be deprived of all rights to maintain itself as applied to the job which should be performed if its commerce is to continue within the contemplation of the Railway Labor Act. Of necessity it would appear that principles of equity would have application, the exigencies of which would warrant the company in continuing the period as to which No. 1 was "out of service" so long as the job is filled by No. 2 in the satisfactory rendition of service. This would have special application to an instance where there was no specific provision of the contract under which employment was conducted which would require the discharge or holding "out of service" of the employee who would be in the position of No. 2 in the situation hypothesized. There is no such specific provision in the contract considered in the instant case.

Of course nothing hereinabove stated should be construed to have any application or effect in any instance of a general strike where, pursuant to a new contract or agreement made in settlement thereof, agreements are entered into which would fix employment rights and seniority as between those who had engaged in the strike and those who were newly employed during the period of the strike.

As applied to that part of the contention which relates to the work being contracted out by the company to maintenance contractors on premises away from those of the com-

pany, we take occasion to note that the contract upon which the contention is asserted has no application to work performed on premises other than that of the company, save and except work performed elsewhere by the company's own employees. Furthermore, this was a subject of grievance which was filed along with those relating to the fifty-three strikers and which was abandoned after once begun and carried through the majority of the "steps" in grievance procedure prior to the filing of the suit. What we have already said relative to the binding effect of the election by the union and employees to proceed under grievance procedure would apply to this matter as well.

We have heretofore mentioned that the company at all times refused to recognize and consent that there would be any jurisdiction of the cases filed under the grievance procedure in the various boards and bodies, prescribed by the contract and by the Act to consider grievances. There is a point of error grounded in the contention that the trial court erred in failing and refusing to find that the company violated the contract by such refusal.

This matter is not material. The Company's act could be no more than a challenge of jurisdiction. Just as in instances of litigation in the courts jurisdiction may be attacked as to the persons or as to the subject matter and the challenge so presented sustained or denied. Even when it is ultimately determined that the challenge is groundless, he who made the challenge has lost nothing to which he was entitled, although conceivably he might have failed to gain something to which

he would have been entitled had he claimed it. He is certainly not estopped to make his other defenses. Jurisdiction, if it exists, is not impaired by a contention that it does not exist, and one who successfully resists a contention that jurisdiction does not exist gains nothing except a ruling which sustains the jurisdiction.

It will be obvious to counsel for the litigants on this appeal that in some instances the points of error have been sustained, and in other instances they have been overruled. In no instance, however, would the effect of sustaining a point be to establish any error which would require a reversal of the judgment of the trial court.

Judgment is affirmed.

Frank A. Massey
Chief Justice

Feb. 23, 1962

CONCURRING OPINION

I concur in the affirmance of the judgment.

Thomas J. Renfro,
Associate Justice.

Feb. 23, 1962

APPENDIX B

Order of Supreme Court of Texas
Refusing Petition for Writ of Error

IN THE SUPREME COURT OF TEXAS

No. A-9035 July 11, 1962

International Association of Machinists et al.
vs.
Central Airlines, Inc.

From Tarrant County, Second District.

Application of petitioners for writ of error to the Court of Civil Appeals for the Second Supreme Judicial District having been duly considered by the Court, and the Court having determined that same presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be, and hereby is, refused. It is further ordered that the applicants, International Association of Machinists et al. (named as appellants in the judgment of the Court of Civil Appeals), and their sureties, Otto B. Mullinax and C. W. Dixie, pay all costs incurred on this application.

—0—

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the order entered by the Supreme Court of Texas on application for writ of error as numbered

and styled above, as the same appears in the minutes of said Court on July 11, 1962.

WITNESS may hand and the seal of the Supreme Court of Texas, at the City of Austin, on this, the 2nd day of August, 1962.

GEO. H. TEMPLIN, CLERK
By /s/ Jewell Seeliger
Mrs. Jewell Seeliger, Deputy

APPENDIX C

The relevant provisions of the Railway Labor Act (44 Stat. L. 577, as amended; 45 U.S.C. §§151-163, 181-188) are as follows:

"TITLE I

"*Section 1.* When used in this Act and for the purposes of this Act—

* * *

"Sixth. The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

* * *

"*Sec. 2.* The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any

interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or

to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * *

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

* * *

"Sec. 3.

"First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board'

* * *

* * *

"Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

* * *

"*Sec. 6.* Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after the termination of conferences without request for or proffer of the services of the Mediation Board.

"TITLE II

"*Sec. 201.* All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

"*Sec. 202.* The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of 'carrier' and 'employee,' respectively, in section 1 thereof.

* * *

"*Sec. 204.* The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

"It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish

a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, Title I of this Act.

"Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarily limited jurisdiction."

The relevant provisions of the Labor Management Relations Act of 1947, as amended (61 Stat. 136, 29 U.S.C. §141 et seq) are as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"Sec. 8.

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

"Sec. 9.

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment."

The relevant provision of the Norris-La Guardia Act (47 Stat. 70, 29 U.S.C. §§ 101-115) are as follows:

"Sec. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to

decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

* * *

"Sec. 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

APPENDIX D

Summary of evidence relating to exhaustion of System Board remedy.

There were two series of cases which the union was seeking to have processed. The first involved the six suspended employees (herein, No. 61, Oct. Term, 1962), and the second, frequently called the "withheld from service cases," involved the grievance cases in the instant petition for certiorari. The contact required that a "deadlock" exist before a case would be referable to a neutral.* The company refused to submit both sets of cases to the same neutral, insisting that no deadlock had yet occurred in the withheld from service cases (Plaintiff's Ex. 4-C, U-36, letter of October 24, 1958). The National Mediation Board, which appoints the neutral, advised that the neutral would hear only cases which both parties agreed were properly before the system board. Therefore, the union, on November 7, 1958 (Plaintiff's Ex. 10), wrote the Mediation Board as follows:

> "With respect to the 'held out of service' cases covered by my letter of September 23, *Mr. Howe takes the position that there is no existing deadlock in the System Board and that therefore the request for a neutral is not properly presented at this time.* Mr. Howe concludes his letter by stating that Central Airlines is agreeable to having Mr. Robertson act as a neutral on the suspension and discharge cases which are recognized by the carrier as deadlock disputes.

*The System Board agreement does not provide for any time limit in which the union and company Board members shall complete consideration of the case. Paragraph M of the Agreement (p. 43 of the contract) simply provides that if the Board fails to reach a decision it shall endeavor to agree within 30 days upon a procedure for breaking such a deadlock. The *30-day provision does not begin to run until deadlock has occurred.* (Pl. Ex. 4-A.)

"In the interests of avoiding confusion in the record before the Mediation Board and the neutral referee and eliminating as much as possible unnecessary disagreement between the parties on procedure, and as suggested by your letter of October 30 to Mr. Howe, a copy of which was sent to me, *I am at this time withdrawing the request contained in my letter of September 23 for the appointment of a neutral to resolve the 'held out of service' disputes without waiving any right of the International Association of Machinists to later request the appointment of a neutral* and with the hope that this disagreement between the Machinists and Central Airlines on the further processing of these cases may be amicably resolved by them." (Emphasis added.)

The parties then made arrangements for the hearing and held the hearing in the cases involving the six suspended employees (S. F. 382-417), and *agreed*, according to undisputed testimony (S. F. 406-408), that they would take up the instant cases after neutral Robertson completed the other hearing. It was not until several months later, specifically on June 24, 1959, that the company indicated for the first time that it would refuse to process the instant cases before the system board (Plaintiff's Ex. 4C, U-44, S. F. 409-410). *Up to that time it had maintained that no deadlock existed* because the union had not completed presentation of its case, and that the board would "recess indefinitely" until certain *live* rather than *written* evidence was introduced. (Statement of F. E. Howe at July 3, 1958, hearing.) Relying on that statement, the union attempted to meet the company's objections, only to learn—long after it had temporarily withdrawn its request for a neutral but reserving its rights—that the company had reversed its position and was refusing

to participate further. A hearing was called for June 29, 1959, at which time the company Board members "walked out". (Pl. Ex. 4, pp. 24-25.) The union members of the system board finally attempted to obtain an executive session to declare a deadlock, but the company members failed to show up (S. F. 412-413). It was undisputed that the deadlock was impossible without company participation (S. F. 417) and the National Mediation Board would not appoint a neutral without agreement of the parties (Plaintiff's Ex. 4-C, U-37 and 38 and Plaintiff's Ex. 9 and 10).

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IN THE

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OCTOBER TERM, 1962

No. 495

INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL, *Petitioners*

vs.

CENTRAL AIRLINES, INC., *Respondent*

REPLY TO PETITION FOR CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 495

INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL, *Petitioners*

vs.

CENTRAL AIRLINES, INC., *Respondent*

REPLY TO PETITION FOR CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Central Airlines, Inc., respondent, prays that the Petition for Certiorari be dismissed or, in the alternative, that it be denied. Respondent denies jurisdiction and denies error, and in support of such contentions presents the following:

STATEMENT OF THE CASE

This was a damage suit filed by former employees of Central Airlines and their bargaining representative, International Association of Machinists, suing Central Airlines on a claim that the individual plaintiffs were wrongfully discharged from their employment as mechanics and shop employees of Central Airlines. The plaintiffs had the election to try the

case before a jury or before the Judge only, and elected to try it before the Judge. There was an extensive trial on the merits, and the Trial Court found against the plaintiffs on every issue and rendered judgment that the plaintiffs take nothing. That judgment was affirmed by the Texas Court of Civil Appeals, and application was made by the petitioners to the Texas Supreme Court for writ of error to review that decision. On initial consideration the Texas Supreme Court denied that writ, and the petitioners elected to permit that denial by the Texas Supreme Court to become final by failing to file, as they had an unconditional legal right to do, a motion for rehearing in the Texas Supreme Court. For the convenience of the Court we have divided this brief into sections as follows:

FIRST SECTION

A. The strike was illegal because any strike under the Railway Labor Act, over a matter which could have been, should have been and actually was handled through the grievance procedure and final arbitration, is illegal.

B. The strike was illegal irrespective of the Railway Labor Act, because the Union-Central Contract provided for grievance procedure and binding arbitration, and therefore any strike over a matter which could have been, should have been and was actually handled through the grievance procedure and final arbitration, was illegal.

C. The plaintiffs, who quit their jobs to participate

in an illegal strike, thereby either terminated their employment or gave the defendant employer the right to recognize same as a termination of their employment, and when the strike was concluded without any agreement by the employer to take them back, the company had no obligation to re-instate them.

D. Under undisputed facts and findings of the Trial Court supported by the evidence, the company had employed replacements for the strikers and had effected efficiencies in its operations, so that at the time the union called off the strike there were vacancies for only part of the strikers. The company, having agreed with the union only that it would re-employ the strikers in the order of their seniority to the extent that vacancies were then available, and having done so scrupulously and restored the strikers for whom vacancies were available to their former seniority, the remaining strikers for whom vacancies were not available have no cause of action against the defendant.

SECOND SECTION

If the petitioners were not barred from recovery herein because the company had a right to refuse to re-instate them under the circumstances, then they were barred having elected to follow the grievance procedure route, and the last decision of the administrative procedure having been adverse to the petitioners, they, having abandoned that route, let such decision become final and are barred from recovering for wrongful discharge.

JURISDICTION

Jurisdiction is denied.

A. This was a suit in the State Court seeking recovery of damages for wrongful discharge, and by way of alternative plea for reinstatement plus damages. The union and the plaintiffs had the option of trying the case before the Court only or before the Court and a jury, and elected to try it before a Court without a jury. There was an extensive and lengthy trial on the merits, and judgment was rendered against the plaintiffs on all points. All issues of fact were decided against the plaintiffs. Essentially, the claims made by the petitioners are a request for the United Supreme Court to review the facts and find differently thereon than did the Trial Judge. No decision by either the Trial Court or the Court of Civil Appeals is contrary to the decisions of this Court or the federal statutes. This will appear in more detail in the body of this Reply to the Petition for Certiorari.

B. Petitioners base jurisdiction on 28 U.S.C.A. Sec. 1257 (Pet. p. 3). Jurisdiction is not shown under such statute for the reason that petitioners did not file a motion for rehearing in the Texas Supreme Court within 15 days after the rendition of the judgment of that Court denying the application for writ of error. This is therefore not an appeal from the final judgment "by the highest court of a state in which a decision could be had," as required by the statute.

Petitioners (Pet. pp. 2 and 3) have correctly stated that they filed an application for writ of error in the Texas Supreme Court on May 14, 1962, and that said

application was refused without opinion on July 11, 1962. They likewise correctly state that that decision is now final. In such situation certiorari is properly directed to the Court of Civil Appeals.

The point is, however, that petitioners did not file an application for rehearing on their Petition for Writ of Error to the Texas Supreme Court within the 15 days provided therefor. Texas Rule of Civil Procedure No. 515 is copied in full in the appendix hereto p. 47, the pertinent portion reading:

> "A motion for rehearing may be filed with the clerk of the court within fifteen days after the date of rendition of judgment or decision of the court or order refusing or dismissing an application for writ of error, whether such date be in the same or succeeding term of court."

The filing of such application is a matter of right, and not merely a petition to the discretion of the Texas Supreme Court. It is in exactly the same status as the original Application for Writ of Error to the Texas Supreme Court, as authorized by Articles 1728, 1729 and 1730, Revised Civil Statutes of Texas, copied in full in the appendix hereto p. 46. The appellate procedure in the state of Texas has been fully described by Associate Justice Smith of that Court in 1 *South Texas Law Journal*, beginning at page 121. With reference to motions for rehearing on applications for writ of error, Judge Smith says (p. 128):

> "When a motion for rehearing on an application for writ of error is filed, the motion and the record are returned for further study to the justice who reviewed the application originally and

> copies of the motion are distributed to all the justices for their study. The questions involved are again discussed in full conference when report is made on the motion for rehearing."

Petitioners, having failed to take advantage of the right of additional review by the Texas Supreme Court, are not appealing from the final judgment of the final court, but, by reason of their election or neglect, have chosen to permit the judgment of the Court of Civil Appeals to become final.

In such circumstances there is no jurisdiction in this Court under 28 U.S.C.A. Sec. 1257.

Osment vs. Pitcairn, 317 U.S. 587, 87 L.Ed. 481, 63 S.Ct. 21;

Gorman vs. Washington University, 316 U.S. 98, 86 L.Ed. 1300, 62 S.Ct. 962;

McMaster vs. Gould, 276 U.S. 284, 72 L.Ed. 574, 48 S.Ct. 299;

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Southern Electric Co. vs. Stoddard, 269 U.S. 186, 70 L.Ed. 227, 46 S.Ct. 71;

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Mullen vs. Western Union Beef Co., 173 U.S. 226, 43 L.Ed. 635, 19 S.Ct. 877;

Annotation, 56 L.Ed. 1082.

Petitioners recognized both the efficacy and the necessity of such a motion for rehearing by attempting to file such motion beyond the 15 days. We attach in the

appendix (p. 45) a copy of the letter from the Clerk of the Supreme Court of Texas with reference thereto.

It is respectfully submitted that jurisdiction does not exist.

QUESTIONS PRESENTED

We cannot accept the questions presented by petitioners, nor can we without some explanation merely set out the question presented from the respondent's viewpoint.

This is because the petitioners, without telling the Court that they are doing so, in each of their questions presented makes an attack on the fact findings of the Trial Court without claiming that such findings are not well supported by the evidence. To demonstrate this we will quote the questions presented in the Petition for Certiorari (p. 3) and then follow each of those two questions presented with a quotation from the record. Petitioners' first question presented is:

> "1. Whether, under the Railway Labor Act and the collective bargaining contract in effect, a strike protesting denial of union representation is a strike arising over a 'minor dispute' and therefore illegal."

The statement that there was "a strike protesting denial of union representation" is factually untrue under the undisputed record. Factually, the Trial Court found (Tr. 52):

> "The contemplated conference or interview in Vaughan's office was not a hearing within the meaning of Section 22 of the contract. It was

merely an investigation or inquiry which the company had the right to make before it took any further action. *Moreover, if the conference or meeting could be classified as a hearing, it is obvious from the evidence that no hearing ever took place. Since no hearing took place at which the six employees were denied representation, the working agreement between the company and the union could not have been violated. Looking at the testimony in the most favorable light to the plaintiffs, and assuming that the conference in Vaughan's office was intended as a hearing, at most it was merely an attempt to violate the contract, which attempt was never actually consummated.* As a matter of fact, the complaint of the six mechanics was handled in the usual manner provided by Section 22, with grievances properly filed and hearings had, at which time the complainants were properly represented by representatives of the union. Again looking at the matter in the most favorable light to the union, if it be admitted the meeting in Vaughan's office was the kind of conference or interview where the men were entitled to representation, the whole argument involved a minor grievance involving an interpretation of certain proisions of the working agreement between the company and the union. Not only was the matter of union representation at the hearing or meeting in Vaughan's office a matter which must be classified as a minor grieance, but the question of overtime is also in the same category." (Emphasis add 1.)

Petitioners' second question presented:

"2. Whether an air carrier violates the Railway Labor Act by withdrawing its members from a System Board of Adjustment, thus tem-

> porarily disestablishing such board, and whether discharged employees and the certified union representative, because of consequent inability to exhaust System Board remedies, thereby waive right to obtain judicial redress for the carrier's violation of the collective bargaining agreement and the Railway Labor Act."

The statement of the question presented is that the company disestablished the System Board of Adjustment, which is legally impossible, but in any event was contrary to the facts and the findings of the lower courts. For example, we quote from the opinion of the Court of Civil Appeals (quoting 355 S.W. 2d at the top of page 808):

> "At no point did the company so act or refuse to act as to block orderly processing of the cases, and indeed to do so would not be within its power, albeit, as already mentioned, it delayed matters when it could and it at all times contested the right of jurisdiction of those provided and/or required to make determinations — under the theory that the employer-employee relationship which had formerly existed between it and the strikers was voluntarily severed by the employees themselves as the result of their unilateral unlawful strike action. After having petitioned for a neutral referee the union (and the individuals) withdrew application therefor (and for further action under grievance procedure). The suit in district court was filed."

With this explanation, respondent says that the question which petitioners really present by the Application for Certiorari is:

"QUESTION PRESENTED

"Whether the United States Supreme Court can or should review fact findings made by the Trial Court amply supported by the evidence."

PRELIMINARY STATEMENT

As has heretofore been pointed out, this was a trial on the merits before the Court without a jury. The fact that it was tried before a Court rather than before a jury was a matter under the Texas practice over which the petitioners had complete control. They elected to waive a jury and try the case before the Court. The Court rendered judgment against plaintiffs on all contentions. The petitioners did not ask for findings of fact and conclusions of law, and under Texas practice the rules applicable to an appeal from a trial on the merits before the Court without a jury, where no findings of fact or conclusions of law are requested by the appealing party, are stated in the following quotations from *Pecos Mining Co. vs. Richardson*, 318 S.W. 2d 3. Since the principles are beyond dispute, in the interest of brevity we have omitted the authorities contained in the opinion.

> "Concerning the alleged insufficiency of the evidence, it will be observed that no findings of fact or conclusions of law were requested or filed by the trial court, other than the few findings made in its judgment in support thereof. That being true, it is implied that all other necessary fact findings were made in support of the judgment. Under the facts and circumstances presented here, we are required, in determining the sufficiency of the evidence in support of the implied findings, to

consider only that evidence most favorable to the implied findings upon the issues raised and to disregard entirely all evidence to the contrary. *(authorities omitted)* Under the record presented here every issue raised by the evidence must be resolved in favor of the trial court's judgment. *(authorities omitted)* The judgment of the trial court will be affirmed if there is evidence to support it upon any reasonable theory authorized by law. *(authorities omitted)* When a court of competent jurisdiction has rendered judgment in a civil case it must be presumed that the judgment appealed from is correct unless the contrary is made to appear affirmatively from a proper record of the proceedings had in the trial court. *(authorities omitted)* In this case the trial judge was the trier of facts and the sole judge of the credibility of the witnesses and the weight to be given to their testimony and had the right to believe or disregard any evidence. *(authorities omitted)*"

The Trial Court rendered a written opinion (Tr. p. 48 et seq.). The opinion summarizes the evidence, and while under Texas practice (*Ramirez vs. Milton Provision Co.*, 231 S.W. 2d 547) it does not take the place of findings of fact and conclusions of law, it is quite helpful.

Petitioners' statement (Pet. p. 4 et seq.) disregards the record and disregards the fact that this was a trial before the Court without a jury at petitioners' election and that the Trial Court rendered judgment against the plaintiffs on every fact. Petitioners would have the Court believe that this was a suit by petitioners for a declaratory judgment or for an injunction to determine the validity of the actions of the

System Board of Adjustment. Nothing could be further from the truth. This was a suit by petitioners claiming that they were wrongfully discharged by Central Airlines and seeking to recover damages and, in the alternative, for re-instatement plus damages (Plaintiffs' Original Petition, Tr. 3 to 20). That was the case tried and decided.

Petitioners' statements as to the evidence presented to the Trial Judge are so absurdly incomplete as to very nearly constitute a misrepresentation of the record. Such method of presenting the facts forces us to make a much longer factual statement than would otherwise be justified. Additionally, in several instances the Court of Civil Appeals (but not the Trial Court) has misunderstood the record and consequently failed to summarize it correctly. For example, in the opinion and referring to the conferences between the company and union representatives before the strike was called off, the Court of Civil Appeals said:

> "There was no written agreement in settlement of the strike, and there were no oral commitments by the company regarding the restoration to duty of all or any of them. The company merely stated that it would take each individual as he appeared and process his case."

That is incorrect, as we will show by reference to the record subsequently. What actually happened was that the union demanded that the company fire all the permanent replacements and take back every striker. The company, on the other hand, would agree only that it would take strikers back to the extent that it then had vacancies available, and would take those

strikers back in the order of their seniority. The strikers that were taken back were restored to their full seniority, and, as the chief union representative admitted, the company scrupulously lived up to its agreement to take back the strikers in the order of their seniority to the extent that there were vacancies available. Nor is the Court of Civil Appeals statement that "none of the strikers were ever served with notice of discharge either orally or in writing" correct, since oral notice was given by the company to the union representative, and written notices were sent out on May 9, 1958 to all of the strikers who were not re-employed.

With that general statement, we can take the following from the Trial Court's memorandum opinion (Tr. 48) to get a synopsis of the occurrences which led up to the strike:

> "For some time prior to April 7, 1958, the union and the company had been discussing amendments to their working agreement, one of which involved the allocation and performance of overtime. On April 4 (Friday) the company requested six union mechanics to work overtime on a plane that was in need of emergency repairs before it could be put back into service. All six of the mechanics refused to work overtime on that occasion. Over the week-end the six mechanics in question received written notice from the company that they were suspended from service pending an explanation of their refusal to work overtime as requested, the notice further stating that they should report to Mr. Vaughan, Director of Maintenance, at his office on April 7 (Monday) at eight o'clock A.M. for such purpose, at which

time their excuses would be considered by Mr. Vaughan. The notice went on to state that if their reasons were satisfactory, they would be put back on the job with full pay; otherwise, disciplinary action would be considered. At the hour stated in the notice union representatives appeared at Vaughan's office with the six men involved and demanded that the men be represented at the meeting in Vaughan's office. Vaughan took the position that it was not a union matter and he merely wanted to talk to the men and ascertain their reasons for refusing to work overtime on the plane in question. When the union representatives and the men involved made their position known, Mr. Vaughan reported the matter by 'phone to Mr. Wageneck, his immediate superior, and the latter told Vaughan to send the group to the office of Mr. Howe, Executive Vice-President and Treasurer of the company. When the group arrived at Howe's office, Mr. Wageneck and the company's attorneys were waiting. Apparently the company had anticipated a dispute and had the persons above named present, together with a court reporter, in order that a record might be made of whatever might take place. An argument there ensued, the union representatives contending that the interview or meeting called for Vaughan's office was a hearing within the meaning of Section 22 of the working agreement, which gave the mechanics the right to be represented by the union, while the company contended that no such hearing was intended and that the meeting in Vaughan's office was called merely in order that Mr. Vaughan might be advised as to the individual reasons of the six mechanics for their refusal to work overtime.

"After the company officials and their attorneys had argued back and forth with the union representatives over a considerable period of time no agreement could be reached and the union representatives and the six men left the office of Mr. Howe. The officials of the company and their attorneys then went to the hangar for the purpose of talking to the six men involved, but found that they had left the premises shortly before. The same afternoon the union sent a wire to the company protesting the dismissal of the six men and the company's alleged refusal to grant union representation at the meeting in question and threatened concerted action, unless the men involved were immediately reinstated. The telegram also mentioned the position of the union on the matter of what it called 'forced overtime.'

"The same night at a regular meeting of the union the matter was reviewed and the men were advised by its leaders that a strike would be legal under the circumstances. A unanimous vote to strike resulted, and the mechanics struck at midnight of the same date. On the following morning, April 8, grievances were duly filed in behalf of the six dismissed mechanics and a hearing was had on April 12 while the strike was still pending."

These grievances, about which there will be considerably more talk later, were actually prepared by the six overtime parties (Cornstubble Six) immediately after they walked off Centrals premises and *before* the strike vote and before the commencement of the strike (see testimony of Faircloth, S.F. Vol. II, pp. 504-505). We want to emphasize this, because it demonstrates beyond the power of argument that not

only the Union but the employees themselves were well aware of the fact that both the question of the "hearing" before Vaughan and the question of overtime were matters which could be and would be properly handled by following the grievance procedure.

Next, and equally important, is the fact that the Union called the strike, not because the employees were forced into a hearing where a Union man was not present, but merely because the Company had the arrogant audacity to argue that, under the contract between the Union and the Company, the right of Union officials to be present did not begin until there was a grievance filed. *In short, there was no hearing on April 7 at which a Union official was not present.* It is undisputed that the Cornstubble Six *did not* permit Vaughan to talk to them without the Union man being present. It is undisputed that the only "hearing, interview, interrogation or meeting" held on April 7, 1958 was that held in Howe's office, of which there is a verbatim transcript by Court Reporter Toal (Toal Transcript, Plaintiff's Exhibit 4-D S.F. p. 556 SEQ). The Court ought to read the entire Toal transcript (it is only 21 pages), for it negatives virtually every contention which plaintiffs are making in this lawsuit. But here we want to emphasize that at that meeting L. T. Faircloth, I.A.M. Grand Lodge representative, and George Neal, Union president, were present and Faircloth argued not only the right, under the contract, of the Cornstubble Six to have a Union man present at the Vaughan interview, but he argued the Union's position on overtime. In other words, there was no hearing on April 7, 1958 at which the Union

representative was excluded. The strike was called not because the Cornstubble Six were denied Union representation at a hearing but because the Company had the awesome arrogance to disagree with the Union interpretation of the contract. The Union's position was simply that any company who disagreed with the Union as to the interpretation of a contract must be punished. See testimony of Faircloth, S.F. Vol. II, p. 512 and pp. 523 to 525, from which last page we take the following illustrative quote:

> "What were you talking about as 'disciplinary action'? Was the union disciplining Central? Was the union discipling Central Airlines by striking?
>
> "Yes, sir."

While we recognize that the Trial Court's opinion is only "helpful," we think it would be worthwhile here to quote the Trial Court's discussion of this particular point (Tr. 52):

> "The contemplated conference or interview in Vaughan's office was not a hearing within the meaning of Section 22 of the contract. It was merely an investigation or inquiry which the company had the right to make before it took an further action. Moreover, if the conference or meeting could be classified as a hearing, it is obvious from the evidence that no hearing ever took place. Since no hearing took place at which the six employees were denied representation, the working agreement between the company and the union could not have been violated. Looking at the testimony in the most favorable light to the plaintiffs, and assuming that the conference

in Vaughan's office was intended as a hearing, at most it was merely an attempt to violate the contract, which attempt was never actually consummated. As a matter of fact, the complaint of the six mechanics was handled in the usual manner provided by Section 22, with grievances properly filed and hearings had, at which time the complainants were properly represented by representatives of the union. Again looking at the matter in the most favorable light to the union, if it be admitted the meeting in Vaughan's office was the kind of conference or interview where the men were entitled to representation, the whole argument involved a minor grievance involving an interpretation of certain provisions of the working agreement between the company and the union. Not only was the matter of union representation at the hearing or meeting in Vaughan's office a matter which must be classified as a minor grievance, but the question of overtime is also in the same category."

Generally, when one party determines to punish, discipline or kick another party around, the opposite party has the choice of taking it lying down or defending itself. Central elected to defend itself. That its defense was justified is shown by the fact that none of the other unionized employees of Contral recognized the I.A.M. picket line and all of them continued to work. Central flew its airplanes and did not miss a flight. It commenced hiring *permanent replacements*, after a public announcement to that effect, advertisements in the paper, etc. It took its supervisory force and put them to work as mechanics. It changed methods and increased efficiency. It arranged

for the outside contractors to handle some of the work that had formerly been handled in the shop. In other words, Central kept its airlines flying and kept its maintenance going while the strike was on.

As indicated above, the strike started at midnight on April 7 or 12:01 on April 8, 1958, and on April 14, 1958 the Union heads (Faircloth and Harvey) asked for a meeting with the Company. Their story was that the reason for asking for the meeting was because on that same day the first step of the grievance procedure on the Cornstubble Six's grievances for their suspension and discharge had been held and the Union had represented the Cornstubble Six at that meeting. Actually, of course, the evidence would support somewhat more strongly the conclusion that their reason for wanting the meeting was that Central very successfully was carring on its operations, that it was carrying on a very active campaign to obtain permanent replacements for the strikers, and none of the other unions had supported I.A.M. in its disciplinary action against the airline. This meeting took place and is described in detail by Central's Vice President Howe (S.F. Vol. II, p. 598 et seq.) and by Karl Mueller (S.F. Vol. II, p. 648 et seq.). Howe (S.F. Vol. II, p. 599) gave a condensed version:

> "Q. All right. Tell the Court, according to your best recollection, what occurred at that meeting on the afternoon of April the 14th, 1958.
>
> "A. Well, continuing the approach that whoever contacted me earlier in the day had made at that time, they — the union boys came in and they said they had now had their hearing which

was what they were striking about; they'd had full union representation and so forth, and they were ready to go back to work. And I told him they didn't ask our permission to take the boys out, so they didn't have to ask our permission to take them back.

"They said well, they were ready to put them back to work, and we were all of course in the discussion, but either Karl Mueller or myself told them that this was all very fine, but 'you know we have been hiring permanent replacements; we're continuing to hire permanent replacements as we can find qualified people; there are a number of the jobs which the men vacated voluntarily on midnight of the 7th that have been filled; commitments have been made for certain of the other jobs. The reason commitments have been made but the men were not physically present was because they had to give notice to their present employer; and that further the company had re-evaluated its maintenance department in view of the strike. We had determined in a policy meeting that we didn't have sufficient supervisory people there; that we had employed more supervisor; we had learned some things as to efficiencies and non-efficiencies, and we had eleminated certain jobs, so that if the men wanted to return, it was with the full knowledge that there were only—there were certainly a lesser number of vacancies available than there were jobs when the men voluntarily left the employ of the company and went out on strike.'

"With that, Mr. Faircloth, and admittedly I'm condensing this thing and making it very succinct, but Mr. Faircloth then told me, and I can remember these words because I usually remem-

ber threats, he said, 'Well, you ain't seen nothing yet then, if that's the way you want it. You ain't going to take them back, well, we'll get tough and show you how to really get rough on this thing'.

"And I can remember my reaction, because it's usually the same to things like that: 'Well, we've taken all you've handed out so far and we'll attempt to take anything you can hand out in the future.' "

The conference was a three- or four-hour conference, and the above is summary of the portion we want to talk about now. For a full discussion of it, see the testimony of Karl Mueller (S.F. p. 648 et seq.).

Following that, both the Union and the Company representatives appeared before the pilots union (Howe, S.F. Vol. II, p 601), and after the pilots would not support I.A.M.'s punishment of Central, the Union called for another meeting, which was held on April 16, 1958. Howe describes it (S.F. Vol. II, p. 610 et seq.). Mueller describes it (S.F. Vol. II, p. 666 et seq.). There the Company again reiterated its refusal to take back more strikers than there were vacancies available, and again said the best it would do would be take back the strikers, in the order of their seniority, to the extent that there were vacancies available. The Union officials then said they were calling off the strike effective that midnight and that the strikers would report their availability for employment to the employment office on April 17. The strike was called off at midnight on the 16th, and the strikers did report their availability to Central's

employment office, where their names, addresses and telephone numbers were taken.

The foregoing constitutes a rather full statement of everything involved except a reference to the evidence about the filing, processing and denial of the grievances by the petitioners in this case (not the Cornstubble Six), but an accurate summary of the record in that respect is contained in the Court of Civil Appeals opinion, a part of which we quoted under "Questions Presented," and we will not repeat it here.

FIRST SECTION

A. The strike was illegal because any strike under the Railway Labor Act, over a matter which could have been, should have been and actually was handled through the grievance procedure and final arbitration, is illegal.

B. The strike was illegal irrespective of the Railway Labor Act, because the Union-Central Contract provided for grievance procedure and binding arbitration, and therefore any strike over a matter which could have been, should have been and was actually handled through the grievance procedure and final arbitration, was illegal.

C. The plaintiffs, who quit their jobs to participate in an illegal strike, thereby either terminated their employment or gave the defendant employer the right to recognize same as a termination of their employment, and when the strike was concluded without

any agreement by the employer to take them back, the company had no obligation to re-instate them.

D. Under undisputed facts and findings of the Trial Court supported by the evidence, the company had employed replacements for the strikers and had effected efficiencies in its operations, so that at the time the union called off the strike there were vacancies for only part of the strikers. The company, having agreed with the union only that it would re-employ the strikers in the order of their seniority to the extent that vacancies were then available, and having done so scrupulously and restored the strikers for whom vacancies were available to their former seniority, the remaining strikers for whom vacancies were not available have no cause of action against the defendant.

ARGUMENT

Unless this Court is going to give the petitioners a de novo review of the facts, the case presented to this Court is as follows:

Central Airlines ordered six employees (the Cornstubble Six) to work overtime. They refused, (April 4, 1958) and the company ordered them to go to their foreman at 8 A.M. Monday, April 7th and give him the reasons why they refused to work. The men refused to attend such interview unless they were accompanied by union representative, and the company refused to let the union representative be present. Therefore, no meeting was held, no interview was had, no hearing took place at which the employees were denied union representation. As a matter of fact,

at that very time the union representatives and the men did have a meeting with the company representatives, and the union representatives (particularly Faircloth) held forth at length and none of the Cornstubble Six so much as opened his mouth or was asked a question. The company fired the six employees for refusal to work overtime and for refusal to give reasons for not working overtime. The six fired employees prepared their grievances on April 7, 1958 in the morning. That night the union held a meeting and called a strike effective at midnight. On the 8th the grievances for the Cornstubble Six were filed, and they were processed through the grievance procedure and ended up ultimately in an award favoring the six employees and ordering their re-instatement with back pay.

The processing of the grievances and the award is conclusive proof that the matters complained of, and for which the strike was called, not only could have been grieved but were actually grieved and successfully handled through the grievance and arbitration procedure. The strike started after the grievances were prepared but before they were filed, but continued after they were filed and, as a matter of fact, after the first hearing on the grievances. Also, during the strike the company elected to continue its service to the public and to protect itself by employing permanent replacements, rearranging its work, effecting efficiencies, and arranging to have some of the work done by independent contractors. When the union and the employees observed the company's success in maintaining its operations and in hiring replacements

for the strikers, the union approached the company asking for terms on which the strike could be called off. The first meeting broke up when the company refused to fire the replacements and hire back all of the strikers. At the second meeting the company offered to take back the strikers in the order of their seniority, to the extent that there were then vacancies available. Whether the union expressly agreed to that might be an issuable fact, but that it did call off the strike on those terms is undisputed. It is also undisputed that the company lived up to its agreement scrupulously, taking back the strikers with the most seniority and restoring them to their old seniority. The plaintiffs in this case are the strikers who did not have enough seniority to get their jobs back, and a few who for a short time had to take lower classification jobs because the strikers who were taken back had more seniority than they did.

The Trial Court and the Court of Civil Appeals both held that the strike was illegal. That holding was correct, first because under the Railway Labor Act (45 U.S.C.A. Secs. 151-188) a strike by railway or airline employees over minor matters, which could have been and should have been and were handled through the grievance and arbitration procedure, is illegal.

B. of R.T. vs. C.R.I. & R. Co., 353 U.S. 30, 1 L.Ed. 2d 622, 77 S.Ct. 635;

B.L.E. vs. M.K.T. R. Co., 363 U.S. 528, 4 L.Ed. 2d 1379, 80 S.Ct. 1326;

B.R.T. vs. N.Y. C. R. Co. (6th C.C.A.), 246 F. 2d 114;

L. & N. R. Co. vs. B.L.E., 190 F. Supp. 829;
Hilbert vs. Pennsylvania R. Co. (7th C.C.A.), 290 F. 2d 881;
Ringle vs. Transcontinental & Western Air, Inc., 113 F. Supp. 897;
Sigfried vs. Pan Am Airlines (5th C.C.A.), 230 F. 2d 13;
B.R.T. vs. RR Retirement Board (District of Columbia C.C.A.), 239 F. 2d 37;
American Airlines vs. Airline Pilots Ass'n, 169 F. Supp. 777;
Rutland Ry. Corp. vs. B.L.E., 188 F. Supp. 721;
Northwest Airlines vs. Transport Workers Union, 190 F. Supp. 495;
L. & N. R. Co. vs. Brown (5th C.C.A.), 252 F. 2d 149;
Pennsylvania R. Co. vs. T.W.U., 178 F. Supp. 30;
B. & O. R. Co. vs. United R. Workers, (2nd C.C.A.), 271 F. 2d 87;
Pennsylvania R. Co. vs. Local 2013, 178 F. Supp. 53;
Northwest Airlines vs. I.A.M., 178 F. Supp. 825;
N. & P. B.L.R. Co. vs. B.R.T. (4th C.C.A.), 248 F. 2d 34.

Secondly, the strike was illegal because under the union contract, which provided a grievance procedure and an arbitration procedure, the strike would have been illegal even if the Railway Labor Act had not applied and the National Labor Relations Act had

applied. This Court made a conclusive determination of that rule in the case of Local 174, *Teamsters Union vs. Lucas Flour Co.*, 369 U.S. 95, 7 L.Ed. 2d 593, 82 S.Ct. 571, from which we quote:

> "Whether, as a matter of federal law, the strike called was a violation of the collective bargaining contract is thus the ultimate issue which this case presents. It is argued that there could be no violation in the absence of a no-strike clause in the contract explicitly covering the subject of the dispute over which the strike was called. We disagree.
>
> "The collective bargaining contract expressly imposed upon both parties the duty of submitting the dispute in question to final and binding arbitration. In a consistent course of decisions the Court of Appeals of at least five Federal Circuits have held that a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement. The National Labor Relations Board has reached the same conclusion. W. L. Mead, Inc., 113 NLRB 1040. We approve that doctrine. To hold otherwise would obviously do violence to accepted principles of traditional contract law. Even more in point, a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warefare. See United Steelworkers of America v. Gulf Nav. Co., 363 U.S. 574, 3 L ed 2d 1409, 80 S.Ct. 1347."

The foregoing specifically approve the holdings of the Circuit Courts in:

International Brotherhood, etc. vs. W. L. Mead,

Inc. (1st C.C.A.), 230 F. 2d 576, p. 583;
N.L.R.B. vs. Dorsey Trailers (5th C.C.A.), 179 F. 2d 589;
United Const. Workers vs. Haislip (4th C.C.A.), 223 F. 2d 872;
Gays Express, Inc. vs. Intl. Brotherhood, etc., 169 F. Supp. 834;
Lewis vs. Benedict Coal Co., 259 F. 2d 346, affirmed 361 U.S. 459, 4 L.Ed. 2d 442, 80 S.Ct. 489.

The Trial Court and the Court of Civil Appeals both held that the strike was illegal, which it obviously was for both reasons heretofore given. The participation in an illegal strike has been held repeatedly by this Court to constitute a termination of the employment by the strikers.

To present this we are going to let the following quotation speak for us. We quote from *N.L.R.B. vs. Sands Mfg. Co.*, 306 U.S. 332, 83 L.Ed. 682, quoting from 83 L.Ed. at p. 690:

> "Respondent rightly understood that the men were irrevocably committed not to work in accordance with their contract. *It was at liberty to treat them as having severed their relations with the company because of their breach and to consummate their separation from the company's employ by hiring others to take their places.* The Act does not prohibit an effective discharge for repudiation by the employee of his agreement, any more than it prohibits such discharge for a tort committed against the employer." (Emphasis added)

The same principle was announced and applied in:

N.L.R.B. vs. Fansteel Metallurgical Corp., 306 U.S. 240, 59 S.Ct. 490, 83 LEd. 627;
Southern Steamship Co. vs. N.L.R.B., 316 U.S. 31, 86 L.Ed. 1246, 62 S.Ct. 886;
N.L.R.B. vs. Drivers Local Union, 362 U.S. 274, 4 L.Ed. 2d 710, 80 S.Ct. 706.

The same principle has been recognized and applied in many Circuit Court cases, including by way of illustration:

B. of R.T. vs. New York C. R. Co. (6th C.C.A.-cert. denied), 246 F. 2d 114;
Ohio Ferro-Alloys Corp. vs. N.L.R.B. (6th C.C.A.-cert. denied), 213 F. 2d 646;
Local No. 3, etc. vs. N.L.R.B. (8th C.C.A.-cert. denied), 210 F. 2d 325.

Under the foregoing authorities then, these strikers participated in an illegal strike and thereby terminated their employment, so the company would have been well within its rights if it had taken back no striker except on the basis of their applying as new employees However, that is not what happened. The company, instead of standing on its strict legal rights, took back the strikers, in the order of their seniority and with full restoration of their seniority rights, to the extent that it had jobs available.

Even if this had been a legal strike, that is, one for a legal purpose and one not in violation of both the contract and the Railway Labor Act, the company

would have had the unquestioned right to defend itself from the economic pressures of the strike by hiring replacements and rearranging its work. And, assuming a legal strike, the company would only have been obligated to do what it did, to-wit, take back the strikers on a non-discriminatory basis (seniority here), and not deny them restoration of their seniority. In other words, in short, Central Airlines here took back the strikers exactly as it would have done had the strike been legal, and surely participants in an illegal strike are not entitled to greater rights than participants in a legal strike.

Now, what is the law with reference to the right of a company to protect itself from the economic pressure of a strike?

The following Language from *NLRB vs. Mackay Radio & T. Co.*, 304 U.S. 33, 58 S.Ct. 910, 82 L.Ed. 1381, is pertinent to the point here under discussion:

> "*. . . Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although § 13 provides, 'Nothing in this Act shall be construed so as to interfere with or impede or diminsh in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the place of strikers, upon the election of the latter to resume their employment, in order to create places for them. . . .*
>
> * * *
>
> "*As we have said, the respondent was not*

bound to displace men hired to take the strikers' places in order to provide positions for them. . . ." (Emphasis added.) p. 1390.

Or, quoting from *N.L.R.B. vs. Robinson* (6th C.C.A. cert. denied), 251 F. 2d 639, pages 640 and 641:

> "In July, 1954, the union and respondent disagreed as to the interpretation of the bargaining contract under which respondent had laid off two employees. The controversy was handled as a grievance but, while grievance proceedings were carried out on both sides, the matter was deadlocked. Early in October, 1954, *the union struck respondent's operation in Knoxville, Tennessee, in order to compel respondent to accept its interpretation of the contract.* The strike lasted only seven hours, as a state court enjoined the strike. The strike was renewed on October 18, the injunction being dissolved, and was abandoned on December 10, 1954."
>
> * * * * *
>
> "*This was an economic strike in which respondent was entitled to hire permanent replacements and was compelled to reinstate only so many strikers as there were vacant places to be filled at the temination of the strike.*" (Emphasis added.)

The *Mackay* doctrine has never been questioned. See, for example:

> *Associated Unions of America vs. N.L.R.B.* (7th C.C.A.-cert. denied), 200 F. 2d 52;
> *Vogue Lingerie, Inc., vs. N.L.R.B.* (3rd C.C.A.-cert. denied), 280 F. 2d 224;

Shopmens Local vs. N.L.R.B. (6th C.C.A.-cert. denied), 219 F. 2d 874;
N.L.R.B. vs. Wooster (6th C.C.A.-cert. denied), 236 F. 2d 898;
N.L.R.B. vs. W. L. Rives (5th C.C.A.-cert. denied), 288 F. 2d 511;
Vulcan-Cincinnati, Inc. vs. United Steel Workers (6th C.C.A.-cert. denied), 289 F. 2d 103.

We therefore say that these petitioners, the plaintiffs in the Trial Court, being the strikers who did not have enough seniority to entitle them to a vacant position, had no cause of action against the respondent, defendant in the Trial Court. This is true, whether the case be tested under the Railway Labor Act or under the National Labor Relations Act.

Of course, petitioners have some twaddle about unfair labor practice, but they cannot support it by any reference to the record nor by any authorities. In the first place, there was no unfair labor practice, unless it is an unfair labor practice to disagree with the union's interpretation of the contract. The union's statement that there was "a denial of union representation" is just not true. Not only the record but also the Court of Civil Appeals opinion and the opinion of the Trial Court make such a statement an outright misrepresentation. If the union had won this case, so that every disputed issue of fact would be resolved in its favor and the record would be construed most favorably to it, the most that could be said was that the company attempted to hold a hearing involving employees at which it attempted to exclude union rep-

resentatives, but through the diligence of the union such attempt was defeated. Or, as the Trial Court put it (Tr. 52):

> "Moreover, if the conference or meeting could be classified as a hearing, it is obvious from the evidence that no hearing ever took place. *Since no hearing took place at which the six employees were denied representation, the working agreement between the company and the union could not have been violated. Looking at the testimony in the most favorable light to the plaintiffs, and assuming that the conference in Vaughan's office was intended as a hearing, at most it was merely an attempt to violate the contract, which attempt was never actually consummated.* As a matter of fact, the complaint of the six mechanics was handled in the usual manner provided by Section 22, with grievances properly filed and hearings had, at which time the complainants were properly represented by representatives of the union." (Emphasis added.)

The Court will notice that the foregoing quotation construes the evidence most favorably to the losing party, to-wit, the plaintiffs. If the evidence is construed most favorably to support the Trial Court's judgment, as it must be, then the Trial Court's finding is and was that the company had no intention of holding the character of hearing contended for by the union, and consequently the company was correct in its position that the union representation, which they conceded the Cornstubble Six was entitled to, began when the company's investigation was completed and discipline was finally assessed.

There are some other statements in the Petition for Certiorari with reference to "unfair labor practice strikes," but, as the record shows, what was here involved was a strike over a matter which could have been, should have been and actually was successfully handled through the grievance and arbitration procedure. Under the Railway Labor Act, there is no such thing as "unfair labor practice strikes" over a matter which could have been and should have been handled through the grievance and arbitration procedure. In addition to the cases heretofore cited, the breadth of this Court's decision in *B.L.E. vs. M.K.T. Ry. Co.*, 363 U.S. 528, 4 L.Ed. 2d 1379, 80 S.Ct. 1326, negatives the possibility of a valid strike under the Railway Labor Act over any matter which could be handled through the grievance procedure to binding arbitration.

In addition, we should point out that the Trial Court specifically found no unfair labor practice (Tr. 53), saying:

> "I cannot go along with the contention of the plaintiffs that the employees could engage in an illegal strike and still retain their employee status under the contract, particularly where the strike was not precipitated by unfair labor practices."

Here again, all the petitioners are doing is asking this Court to ignore the fact findings against the petitioners and permit them to make the same argument on the facts that they made in the Trial Court unsuccessfully.

We say that for all of the foregoing reasons there

is no jurisdiction, and if the Court granted this Application for Certiorari, the only judgment it could enter would be one affirming the decision of the Texas Courts.

SECOND SECTION

If the petitioners were not barred from recovery herein because the company had a right to refuse to re-instate them under the circumstances, then they were barred having elected to follow the grievance procedure route, and the last decision of the administrative procedure having been adverse to the petitioners, they, having abandoned that route, let such decision become final and are barred from recovering for wrongful discharge.

ARGUMENT

The respondents deem that no detailed statement is necessary under this, for the reason that the Court of Civil Appeals dealt with it rather elaborately.

First, let us point out that in our brief in the Court of Civil Appeals we presented the authorities showing that the Trial Court had no jurisdiction to enter a judgment of reinstatement and that the only cause of action of which the Trial Court did have jurisdiction was the one asserted by the plaintiffs in this lawsuit for recovery of money damages for wrongful discharge. Such a cause of action for damages for wrongful discharge requires the recognition by the plaintiffs that their employment has been permanently terminated. See particularly *Transcontinental & West-*

ern Air vs. Koppal, 345 U.S. 653, 73 S.Ct. 906, 97 L.Ed. 1325; *Slocum vs. D. & L. W. R. Co.*, 339 U.S. 239, 70 S.Ct. 579, 94 L.Ed. 795; *Moore vs. Illinois Central R. Co.*, 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089.

Under the foregoing cases *(Transcontinental & Western Air vs. Koppal*, and *Slocum vs. D. &. L. W. R. Co.)* it should be kept in mind that some states require that before an action for wrongful discharge can be brought the plaintiff *must* exhaust his administrative remedies through the grievance procedure. (See 72 *A.L.R.* 2d 1439). That, of course, is not the law in Texas since *T. & N.O. R. Co. vs. McCombs*, Tex. S.Ct., 183 S.W. 2d 716. It follows therefore that in those states (not Texas) where the exhaustion of the administrative remedies is required as a condition precedent to a damage suit for wrongful discharge, the commencement of the grievance procedure for reinstatement does not constitute a binding election. See, for example, *Sjaastad vs. G.N.R.R. Co.*, 155 F. Supp. 307.

On the other hand, where the employee claims a wrongful discharge and actually proceeds through the grievance procedure and has an award of the adjustment board against him, it bars his damage suit. This is the exact holding of the United States Supreme Court in *Union Pacific R. Co. vs. Price*, 360 U.S. 601, 3 L.Ed. 2d 1460, 79 S.Ct. 1351. *Sarran vs. Mo. Pac. R. Co.* (writ ref) 330 S.W. 2d 925.

In the case now before this Court the plaintiffs processed their grievances first through Vaughan, *and*

they were denied, then through Wageneck, and *they were again denied*. They then appealed to the System Board which held a hearing, under protest by the airline, at which nothing was presented but an affidavit and the chairman ruled that such affidavit constituted no evidence and an abandonment of the claims. This resulted in a wrangle and a deadlock between the Union members and the company members. The Union members then held an ex parte hearing in which additional evidence was introduced and in which the company refused to participate. This too produced a deadlock. (S.F. p. 418 et seq.)

As the Court of Civil Appeals opinion accurately described the situation, the plaintiffs here first asked for an arbitrator to break the deadlock and then withdrew that request, and thereby permitted the decision in the last step of the grievance procedure against them to become final, since the 30 days for the appeal had expired some dozen times before the lawsuit was filed. Also, of course, as indicated by the cases above referred to, when the plaintiffs walked into the courthouse and asked for damages for wrongful discharge, the plaintiffs then conceded, as the Court of Civil Appeals says they did, that their employment was terminated at the beginning or the end of the strike and therefore they were not employees. But again, just to keep the plaintiffs from blowing hot and cold, and to reinforce the Court of Civil Appeals decision, we point out applicable authorities, holding directly in this exact situation that having proceeded part way up the grievance procedure and letting become final a decision against them, the cause of action for dam-

ages is forever barred. Among these cases are the following:

Crusen vs. United Air Lines, Inc. (D.C.-Colo, 1956), 141 F. Supp. 347, affirmed 239 F. 2d 863;

Barker vs. Southern Pacific Co. (1954), 214 F. 2d 918;

Breeland vs. Southern Pacific Co., 231 F. 2d 576;

Peoples vs. Southern Pacific Co., 232 F. 2d 707;

Atlantic Coast Line R. Co. vs. Pope (4th C.C.A.), 119 F. 2d 39;

Hooser vs. B. & O. R. Co. (7th C.C.A.), 279 F. 2d 197;

Anson vs. Hiram Walker & Sons, Inc. (7th C.C.A.), 248 F. 2d 380.

For this additional and alternative reason, the judgment of the Trial Court and the Court of Civil Appeals is correct.

SUMMARY

JURISDICTION

The respondent denies jurisdiction, first, because petitioners had a lengthy trial on the merits, and every issue of fact was found and decided against the petitioners. Petitioners do not attack the fact findings, but seek to have the United States Supreme Court give them a de novo consideration of the facts, which the Supreme Court of the United States has no jurisdiction to grant.

Jurisdiction is denied, also, because the petitioners failed to file a motion for rehearing on their Application for Writ of Error, and therefore under the jurisdictional statute they did not exhaust their state remedies, and this is not an appeal from the final judgment "by the highest court of a state in which the decision could be had."

FIRST SECTION

This is a lawsuit filed in the State District Court by the petitioners as plaintiffs, claiming a wrongful discharge by the defendant, Central Airlines, Inc. What happened was that the company ordered six employees (the Cornstubble Six, not plaintiffs here) to work overtime, and they refused. The company then instructed the Cornstubble Six to report to their foreman and give their reasons for refusal to work overtime. The Cornstubble Six refused to give reasons for their failure to work overtime unless there was a union representative present at the interview by the foreman. The company took the position that what

was contemplated was merely a part of the investigation to determine whether discipline would take place. The union representatives met the company representatives, and a long hassle ensued as to whether under the union contract the Vaughan interview was a "hearing" or merely an investigation. The union was adamant that no interview would take place unless a union representative was present, and the company was adamant that under its construction of the contract it was entitled to carry on its investigation without interference by the union. No interview took place. No hearing took place at which the union was not present. The Cornstubble Six were discharged because they refused to work overtime and because they refused to give any reason for their failure to work overtime. They immediately prepared grievances complaining of the action of the company. All this took place on April 7, 1958. That night there was a union meeting and a strike vote was taken, and at midnight the union went on strike. At 10:00 A.M. on April 8 the grievances for the Cornstubble Six were filed. They were duly processed, and a hearing was held, at which union representatives were present, for the Cornstubble Six, on April 14, 1958, and the strike was terminated on April 17, 1958. In the interval, the company publicly announced, and the union and the employees had notice, that the company was hiring permanent replacements. The company likewise rearranged its work, added supervision, contracted out some of the work which had been contracted out in the past but was not contracted out at the time of the strike, and carried on its business without interrup-

tion, although the strike lasted ten days, as indicated. There were two meetings between the company representatives and the union representatives with reference to calling off the strike. The union representative demanded that all of the strikers be taken back, and the company refused to fire the permanent replacements and to change the re-arrangement of its work and to eliminate the efficiencies put into effect during the strike. Finally, the company agreed that it would take back the strikers in the order of their seniority, to the extent that there were vacancies then available. It scrupulously lived up to its agreement, taking back all of the strikers in the order of their seniority, and the union admitted that the company lived up to that agreement. Actually, the strikers taken back were restored to their prior seniority, and the plaintiffs in this case represent those strikers for whom there were vacancies not available, and in a few instances some who took jobs of lower classifications for a temporary period because of the fact that other strikers who were taken back had more seniority for the particular classification.

The respondent says, in the first place, that a strike over a matter which could have been, should have been and was actually handled through the grievance procedure to final arbitration, is illegal under the Railway Labor Act.

The company says, in the second place, that any strike (under the Railway Labor Act or under the N.L.R.A.) over a matter which could have been, should have been and was actually handled through a griev-

ance procedure which provides for final arbitration, is illegal. In other words, you cannot have a legal strike over a grievable matter if the contract provides for a grievance procedure and binding arbitration.

The corollary to the fact that the strike was not only unjustified but illegal was that the company had the right to consider that the participants in such a strike had terminated their employment. Or, to put it another way, it had a right to discharge the employees who participated in such an illegal strike, and had no obligation to re-instate them with or without seniority.

Further, the company says that even if the strike were not illegal, it was at most an attempt by the union and the men it represented to force upon the company the union's construction of the contract, and as in any other economic strike the company had a right to defend itself by hiring replacements. When the union called off the strike the company did the most that any employer could be required to do, and that is to the extent vacancies were available to fill them on a non-discriminatory basis. The basis on which the company agreed to hire strikers was in the order of their seniority. Having complied strictly with that non-discriminatory re-employment, and none of the re-employed strikers being discriminated against or having lost seniority, plaintiffs have no cause of action.

SECOND SECTION

This is an alternative position. The respondent says that when the petitioners filed suit in the District Court of Tarrant County, Texas, for wrongful discharge, they recognized the permanent termination of their employement and were relegated to an action for damages for wrongful discharge. That they had a trial on the merits on that issue, and lost on fact findings against them. If the respondent, however, is wrong and the petitioners did not by filing suit in the District Court of Tarrant County, Texas, recognize the final and complete termination of their employee status, then the respondent says that the petitioners and each of them filed grievances claiming such wrongful discharge in accordance with the union contract, and such grievances were denied at each hearing. That ultimately same went to the System Board of Adjustment, at which time the union failed to present them. When the company representatives and the union representatives were unable to agree whether there was or was not anything before the System Board, the union applied for arbitration and then withdrew the request. Under the contract more than 30 days (many times more) expired, thereby making final the adverse decision on the merits of these grievances. The respondent says that under such circumstances, if the plaintiffs did not terminate their employment by participation in an illegal strike, they pursued the employee grievance procedure route, lost, and cannot now litigate in the District Court the alleged wrongfulness of their discharge.

CONCLUSION AND PRAYER

WHEREFORE, premises considered, the respondent respectfully prays that the Petition for Certiorari be dismissed for want of jurisdiction, or, in the alternative, that it be denied.

Respectfully submitted,

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Fort Worth 2, Texas

HUDSON, KELTNER, JORDAN, SMITH & CUNNINGHAM

By
Luther Hudson
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Attorneys for Respondent

Two copies of this Reply to Petition for Certiorari have been mailed to Charles J. Morris of Mullinax, Wells, Morris & Mauzy, 1601 National Bankers Life Building, Dallas 1, Texas, and one copy to Plato E. Papps, 1300 Connecticut Avenue, Washington 6, D.C., attorneys for petitioners, on the same day that it was mailed to the Clerk of this Court.

APPENDIX

THE SUPREME COURT OF TEXAS
AUSTIN

July 30, 1962.

Robert W. Calvert
Chief Justice
Meade F. Griffin
Clyde E. Smith
Frank P. Culver, Jr.
Ruel C. Walker
James R. Norvell
Joe Greenhill
Robert W. Hamilton
Zollie Steakley
Associate Justices

Geo. H. Templin
Clerk

Mr. Charles J. Morris, Attorney
Mullinax, Wells, Morris & Mauzy
1601 National Bankers Life Building
Dallas 1, Texas

Re: International Association of Machinists vs. Central Airlines, Inc., No. A-9035.

Dear Mr. Morris:

I have received your letter of July 27, 1962, enclosing petitioners' Motion for Rehearing and Request for Oral Argument in the above case. The envelope shows that the above was mailed in Dallas July 27, 1962, at 7 p.m. As the Court denied the application July 11, 1962, it appears that the Motion for Rehear-

ing was received too late for filing. You may let me know if you want me to return the Motion to you.

Yours very turly,

/s/ George H. Templin
Clerk.

cc: Hudson, Keltner, Jordan & Cunningham
Fort Worth, Texas
Mueller & Mueller
Fort Worth, Texas

Art. 1728, *V.A.C.S.*:

"The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, extending to all questions of law arising in the following cases when same have been brought to the Courts of Civil Appeals from appealable judgment of trial courts:

"1. Those in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision.

"2. Those in which one of the Courts of Civil Appeals holds differently from a prior decision of another Court of Civil Appeals, or of the Supreme Court upon any question of law material to a decision of the case.

"3. Those involving the construction or validity of statutes necessary to a determination of the case.

"4. Those involving the revenues of the State.

"5. Those in which the Railroad Commission is a party.

"6. In any other case in which it is made to

appear that an error of substantive law has been committed by the Court of Civil Appeals which affects the judgment, but excluding those cases in which the jurisdiction of the Court of Civil Appeals is made final by statute."

Art. 1729, *V.A.C.S.*:

"All causes mentioned in the preceding article may be carried to the Supreme Court either by writ of error or by certificate from the Court of Civil Appeals, but the Court of Civil Appeals may certify any question of law arising in any such case at any time they may choose, whether before or after the decision of the case in said Court."

Art. 1730, *V.A.C.S.*:

"The Supreme Court shall from time to time make and promulgate suitable rules, forms and regulations for carrying into effect the articles in this title relating to the jurisdiction and practice of said Court."

Texas Rules of Civil Procedure, Rule 515. Motion for Rehearing:

"A motion for rehearing may be filed with the clerk of the court within fifteen days after the date of rendition of the judgment or decision of the court or the order refusing or dismissing an application for writ of error, whether such date be in the same or a succeeding term of such court. In exceptional cases, if the ends of justice require, the court may shorten the time within which the motion may be filed or even deny the right to file it altogether. The grounds relied upon for the rehearing shall be distinctly specified in the mo-

tion. The motion shall give the name and residence of the counsel of the opposing party if known, and if not known, the name and residence as shown in the record. The party filing such motion shall deliver or mail to each opposing party, or his attorney of record, a true copy of such motion, and shall note on the motion so filed with the clerk that such copies have been so furnished. Upon his failure to do so, he shall accompany his motion with or furnish to the clerk on his request a sufficient number of duplicates or copies thereof for the clerk to use in complying with the provisions of Rule 516. Failure to supply such copies on request of the clerk may result in dismissal of the motion. As amended by order of Sept. 20, 1941, effective Dec. 31, 1941; and by order of Oct. 12, 1949, effective March 1, 1950."

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In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 495

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, *et al.*,

Petitioners,

v.

CENTRAL AIRLINES, INC.,

Respondent.

PETITIONERS' ANSWER TO REPLY TO PETITION FOR CERTIORARI

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1. The Reply in General

Respondent has chosen obfuscation for its reply to petition for certiorari. It seeks to convince this Court that there are fact issues where there are none. It seeks to imply that the petition is directed to the 153rd District Court of Travis County, Texas, rather than to the Texas Court of Civil Appeals. The Court of Civil Appeals made conclusions of both fact and law in its Opinion, as required by Rule 453, Texas Rules of Civil Procedure, and as to questions of fact and the sufficiency of evidence the Court of Civil Appeals is

the "Court of last resort" in Texas.[1] Respondent did not file a motion for rehearing with the Court of Civil Appeals, nor did it seek writ of error as to any part of the decision; therefore, it has no standing to complain of facts which the Court of Appeals found adverse to the respondent.[2] Hence, the ten pages of its reply (pp. 12-21) designed to prove that the Court of Civil Appeals "has misunderstood the record" (p. 12) should be given no consideration.

The reason this case was tried to a court and not to a jury was simply that there never was and there is not now any material fact issue. True, the trial court made certain erroneous conclusions of law as to undisputed facts, but this has no bearing on this petition. Likewise, the Court of Civil Appeals erred in some—but not all—of its legal conclusions, but those conclusions raise issues of law not of fact.

Thus it is unnecessary for petitioners to consume the time of this Court replying to factual arguments which comprise the bulk of respondent's reply brief. However, one factual matter was conspicuous by its absence, and should therefore be noted:

Nowhere does respondent contest the accuracy of petitioners' summary of specific facts relating to petitioners' exhaustion of System Board remedies (Appendix D, pp. 29a-31a), nor does it contest the fact of respondent's withdrawal of its members from the System Board (pp. 7-8 of Petition).

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[1] *4 Tex. Jur. 2d 378; Texas & P. R. Co. v. El Paso, 126 Tex. 86, 85 S. W. 2d 245; Corzelius v. Oliver, 148 Tex. 76, 220 S. W. 2d 632.*

[2] Under Rules 453, 455, and 458, Texas Rules of Civil Procedure, respondent was obligated to raise timely legal objection to the Opinion, and failing to do so is it now bound by that Opinion. *Lone Star Steel Co. v. Owens, 302 S. W. 2d 213, 233.*

As to these, respondent chooses to ignore what the trial court held, that "*the company refused* to recognize the Board's authority in the matter" (Tr. 55, emphasis added). In its summation of evidence, respondent carefully avoided stating anything on this point (pp. 9 and 22), relying only on the erroneous conclusion of the Court of Civil Appeals, which held that the strikers had "abandoned further available steps" in the grievance procedure. But that Court likewise failed to note the undisputed fact that respondent withdrew its members from the System Board, leaving the Board incapable of deadlocking and incapable of obtaining appointment of a neutral to break a deadlock. It is thus not an issue of fact that there were no further available steps open to petitioners. It is indeed curious that respondent gingerly avoids discussing what actually happened as to this highly pertinent issue.

2. First Reason for Granting Writ

As to the first reason for granting the writ—that the strike was akin to an unfair labor practice strike—respondent never comes to grips with the issue and wholly ignores the question posed by the juxtaposition of *Mastro Plastics*[3] with the line of decisions treating the duty to bargain under the Railway Labor Act as parallel to the duty imposed by the National Labor Relations Act. Likewise, respondent was silent as to the conclusions drawn from the cases cited in the Petition at pages 14-17, questioning whether the traditional

[3] *Mastro Plastics Corp. v. N.L.R.B.*, 350 U. S. 270, 100 L. Ed. 309, 76 S. Ct. 349.

concept of "major" and "minor" disputes adequately describes all strikes under the Railway Labor Act.

3. Second Reason for Granting Writ

It is also noteworthy that respondent brushes off the second reason for granting the writ—that respondent disestablished the System Board of Adjustment—with the bald statement that this is "legally impossible." (p. 9.) If so, it is all the more reason for the writ to be granted for although it may be "legally impossible," respondent did it. True, it was legally impossible in the sense that it was unlawful.

4. Jurisdiction

Out of an abundance of caution, petitioners here submit a brief reply to respondent's jurisdictional argument, although a reply may not be necessary because the established decisions in this Honorable Court fail to support respondent's position.

In substance, respondent contends that there was no final judgment below because no motion for rehearing was filed in the Texas Supreme Court as to the denial of writ of error. No such motion for rehearing is required, and none of the authorities cited by respondent deal with that question.[4]

As this Court held in *Market Street Ry. Co. v. Railroad Commission, 324 U. S. 548, 551, 65 S. Ct. 770, 778:*

> "The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the

[4]The authorities cited on page 6 of respondent's reply brief deal with cases where petitioner failed to seek review in a higher state tribunal. None involve absence of a second attempt to obtain review in the same tribunal.

existence of a latent power in the rendering court to reopen or revise its judgment. The waiting period prescribed by the statute here seems to reserve a power of that character. The decision during this period does not lack the attributes of an adjudication, it is not awaiting lapse of time to become a judgment, it merely is subject to modification. When this period runs, unless the court has moved meanwhile, it becomes powerless to change or modify the judgment. City of Oakland v. Pacific Coast Lumber and Mill Co., 172 Cal. 332, 337, 156 P. 468, Ann. Cas. 1917E, 259; In re Estate of Ross, 189 Cal. 317, 318, 207 P. 1014. The rule is thus a limitation on the time during which the court may reconsider, which in absence of such rule might expire only with the end of the term or some other event determinative under local law. Such latent powers of state courts over their judgments are too variable and indeterminate to serve as tests of our jurisdiction."[3]

The petition herein is directed to an intermediate appellate court, whose judgment is final when review has been denied by the highest court of the state, and it is not necessary to make a second request for such review. *Chesapeake & O. R. Co. v. Mihas, 280 U. S. 102, 74 L. Ed. 204, 50 S. Ct. 42; Minneapolis, St. P. & S. S. M. R. Co. v. Roe., 279 U. S. 410, 73 L. Ed. 766, 49 S. Ct. 363.*

In *Southern Railway Co. v. Clift, 260 U. S. 316, 67 L. Ed. 283*, the Court indicated that the existence of a state

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[3]Under Rule 506, Texas Rules of Civil Procedure,

"The judgment of the Supreme Court shall be final at the expiration of fifteen days from the rendition thereof, when no motion for rehearing has been filed."

procedure permitting the filing of a petition for rehearing does not affect the finality of the judgment.

Respectfully submitted,

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November 6, 1962

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The International Association of Machinists and fifty-three discharged employees of Central Airlines, petitioners herein, file this their petition for rehearing on their application for writ of certiorari, and as grounds for such rehearing cite the following compelling circumstances which have intervened since petition for certiorari was filed herein:

1. First Reason for Granting Rehearing

On December 10, 1962, this Honorable Court rendered decision in *Smith v. Evening News Ass'n. (No. 13)*, *U. S.* [*51 LRRM 2646*]. Footnote number 1 of that

opinion suggested that a different decision might have resulted had there been a grievance arbitration procedure in the collective bargaining contract "which had to be exhausted before recourse could be had to the courts."

Although the instant case does not arise under Section 301 of the Labor Management Relations Act, but rather arises under the Railway Labor Act, the difference in the two statutes may not be significant on the issue of whether exhaustion of arbitration remedies is a pre-condition to court action. This case, therefore, poses a question reserved by *Smith v. Evening News*, to wit, whether exhaustion of arbitration [system board] remedies is a condition to bringing an action in court for breach of a collective bargaining contract, and if so, whether such condition is waived by the refusal of the employer to cooperate in the arbitration proceedings.

The Texas Court below held that since the union and the discharged employees "abandoned further available 'steps' in the grievance procedure * * * they are without standing in the courts and the relief prayed for is foreclosed." [p. 13a.] According to the undisputed evidence, however, such abandonment did not occur until two years of effort had been expended by the union trying to obtain a system board decision and after respondent had withdrawn its members from the system board, thereby disestablishing such board and preventing the deadlock which was required as a condition for the appointment of a neutral.

This same question was posed differently in the petition for certiorari. Section 204 of the Railway Labor Act makes

mandatory the establishment of a system board of adjustment; therefore, when a carrier withdraws its members from the system board, thereby preventing such board from functioning, does it not violate Section 204 of the Act? Footnote number 1 of the *Evening News* decision would indicate that this same question now has at least one other facet that requires elucidation in the developing law of enforcement of the collective bargaining contract.

2. Second Reason for Granting Rehearing

On or about October 18, 1962, a System Board of Adjustment award, hereinafter called the Shister award, involving this same union and this same carrier, was issued. The award was written by the Honorable Joseph Shister, as the neutral member of the system board. Respondent carrier refused to comply, just as it had refused to comply with the Robertson award involved in the case of *IAM v. Central Airlines* (Oct. term, No. 61) now pending in this Court. Petitioner union filed suit for enforcement of said award in the United States District Court for the Northern District of Texas (Civil Action No. 9339) where the case is not pending.[1]

Thus a pattern has emerged as to system board cases between respondent and petitioner union.

(a) In April, 1958, respondent denied union representation to six employees at a grievance meeting, thereby precipitating a strike.

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[1]Respondent has contested federal court jurisdiction; therefore, the District Court has continued the case pending decision by the Supreme Court in No. 61 which will be determinative of the same jurisdictional question.

(b) When the system board rendered an award (Robertson Award) calling for reinstatement and back pay of these six employees, who had been fired for failure to attend said grievance meeting, respondent refused to comply, and the enforcement of the award awaits this Court's decision in case No. 61 now pending.

(c) After the Robertson Award was rendered, respondent refused to participate in further system board proceedings on the grievances relating to the discharge of fifty-three strikers, whereupon the instant suit was filed.

(d) Subsequent to the filing of petition for certiorari herein, the aforesaid Shister award was rendered, but respondent refused to comply. Suit for enforcement of said award was therefore filed.

The foregoing represents a consistent attitude which respondent has displayed toward system board procedures required by the Railway Labor Act. Either respondent refuses to permit union representation, refuses to participate in the system board proceedings, or refuses to comply with the system board award. There have been no exceptions to this pattern since April, 1958.

The denial of certiorari herein has had the further effect of hardening respondent's attitude toward collective bargaining, with a consequent effect on contract negotiations which are now in progress. Also, the prospect of being unable to return the fifty-three discharged employees to their

jobs, as a result of the denial of certiorari, has weakened the union's bargaining position.

Thus, the status of system board proceedings at Central Airlines can be resolved only partially by case No. 61 now pending. The instant petition actually presents the greater part of the same dispute—greater in the sense that it represents the jobs of about a third of the entire bargaining unit.

CONCLUSION

For the foregoing reasons, petitioners respectfully urge the Court to grant rehearing of their petition for certiorari, and upon reconsideration to issue the writ.

Respectfully submitted,

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